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WHETHER A STRIKE TO ENFORCE AN ILLEGAL DEMAND IS A CONSPIRACY.

One of the greatest strikes of the century, but one which has created little newspaper notoriety because, fortunately, it has been free from brutal personal assaults, is that of the typographical unions in the United States to force upon all printers and publishers their demand for a closed shop and an eight-hour day. Every center of typographical activity has been affected and, with varying results,—in some cases, the unions seem to have triumphed, and in other cases the day seems to have been carried by members of the typothetæ.

The significance of this strike does not lie in the fact that it is a strike, for if there is any point well settled, it is that workingmen may strike and that they may form labor unions and strike in a body. The courts have established the fact that labor unions enjoy these rights and in doing so have even here been exceedingly liberal in construing ancient common law principles relating to the subject of conspiracy. The strike of the typographical union, however, brings up squarely before the courts of the country the right of a labor union to call out its members in violation of an express written contract that it would not do so; and secondly, the right of a labor union to call out its members, not to benefit themselves or to better the conditions under which they work, but to seek the discharge of other workmen employed by the same master, whom they designate as "scabs" or non-unionists; thirdly, whether after a labor union has struck it has a right to use means comprehended in the general term "boycott" to enforce demands which are unlawful and which in conscience and equity they have no right to make nor enforce.

In the first case referred to, the courts, of course, cannot hesitate a single moment. To say that a labor union alone, out of every other individual and organization in the country has a right to break the contracts into which it has solemnly entered and to which its officers with the sanction of the membership have attached their signatures, with perfect and unhammeled impunity, would be too preposterous to contemplate. And yet, that is exactly what the typographical unions have committed in the present instance, if the evidence offered by members of the typothetæ is to be credited. Thus it is claimed that in some localities the local unions had entered into an agreement to work for nine hours a day for increased compensation, which contract, after having been signed and in process of execution, has been violated by the unions in the present strike.

Thus, for instance, the St. Louis Typographical Union No. 8, had, it is alleged, an agreement with the members of the St. Louis Typothetæ by which the members bound themselves for one year, or until January 1, 1906, to work nine hours a day for an increased compensation. The contract was signed by all members of the typothetæ and by the president of the typographical union after the whole union in mass meeting assembled had approved of the agreement. Later, the national council of the typographical union decreed that the eight-hour day should prevail throught the length and breadth of the land. Like "the laws of the Medes and Persians, which altereth not," this order was construed to nullify the contract of the St. Louis Typographical Union,—a most peculiar construction of the inviolability of a contract, at least in a country where by constitutional limitation even a sovereign state cannot change or nullify a single provision of a contract previously entered into. The president of the St. Louis Typographical Union, let it be said to his credit, upheld for a time the obligation of the contract entered into by the local union, even in defiance of the national order. This resulted, however, in the suspension from the national organization of the St. Louis union and the local union were given to understand that they could not affiliate with the national organization unless they nullified the agreement they had entered into and compelled the members of the St. Louis Typothetæ to agree to the eight-hour day. The local union yielded to this method of coercion and rescinded its agreement for a nine-hour day and demanded a day of eight hours. The members of the St. Louis Typothetæ were indignant at this breach of contract and of good

faith and refused to treat further with the union, and a general strike was called.

The above is only one instance where members of the United Typothetæ of America declare that national and local agreements have been ruthlessly violated, without one word of explanation nor one fact of extenuation. It is hard to see how the labor unions can retain that large measure of public confidence which has been so generously extended to them by the public when they persist in a policy of disregarding contracts entered into by either national or local organization. It is no argument to say that the national organization must control the local organizations. If, indeed, a local organization enters into a binding contract, that contract should at least bind the members of the organization who entered into its obligations although it may in fact not bind in the slightest the national organization; and as this is the rule of law affecting other local organizations representing in their localities societies of national scope and jurisdiction, it must be the rule of law applicable to labor organizations: and such local labor organizations and the members thereof who voted in favor of any contract subsequently entered into by its officers, must be held liable for the breach of any such contract and for any damages resulting from such breach.

The second question is the question of the so-called "open shop," the right of the employer to employ anyone he pleases to work for him who is competent and who is not a source of danger to his fellow workmen. The correlative proposition is the right of a labor union to call out its workmen to force the discharge of any workman, not because he is incompetent nor because he is a source of danger to his fellow workmen, but because he refuses to become a member of the organization which seeks his discharge. The courts must shortly be called upon to decide whether a strike under such conditions is not an illegal conspiracy and whether if such a strike is effective in securing the discharge of the person whose discharge was demanded, the union and the members who participated in the strike are not liable in damages to the one so discharged. Whenever the courts are able to brush aside the veil of class prejudice which labor unions generally succeed in throwing around the discussion of all questions of law in which they are interested, there will be uncovered in all these cases the clear principles of common law justice which denounce as illegal conspiracies any concert of action on the part of several persons to deprive another person of that to which he is justly entitled. The right of every man to work and earn a living is, next to the liberty of his person, the most important right of the individual and its infringement cannot but be regarded as a serious offense against the liberties of the people, which the latter will very naturally resent and which the courts will very promptly rebuke. The labor unions must very quickly drop the slogan of the "closed shop" or lose completely and forever the respect and confidence of that great majority of the American people who believe in fair play and equal rights to all.

The third query raised by the present strike is whether, if the demands of a labor union are in themselves wrong, they have a right to combine to enforce those rights. Is not a combination of several persons to accomplish an illegal purpose a conspiracy? If the demands of the typographical unions in the present case were to better their conditions, increase wages or any other legitimate demand, the courts might very properly be indulgent in restraining the methods used to enforce those demands. But when the demands, as in this case, if enforced, would result in a breach of a contract or in the discharge of persons from employment without just cause, would not the court be compelled to say that a combination of workmen engaged in the attempt to enforce such demands were guilty of unlawful conspiracy. The celebrated English case of Quinn v. Leatham so holds. See 53 Cent. L. J. 302.

Apropos of this discussion, is the very recent opinion of Judge Jesse Holden, of the Superior Court of Cook County, Illinois, in enjoining the typographical union of Chicago from attempting to enforce the demand for a "closed shop" and an "eight-hour day." Judge Holden said: "Industrial strife is progressive in its methods, and while formerly picketing was not unlawful *per se* and boycotting when not done for the purpose of injuring or coercing is neither unlawful, yet when picketing and boycotting are used and indulged as a means to the end of forcing a closed shop union contract upon an employer

against his will they become and are unlawful methods, so held by the courts of this state who have spoken in their condemnation in no uncertain voice. In the anthracite coal case the commission said: 'The right to remain at work where others have ceased work, or to engage anew in work which others have abandoned, is part of the personal liberty of a citizen, that can never be surrendered, and every infringement thereof merits and should receive the stern denouncement of the law.' The foundation of the strike in this case is the union contract, demanding a closed shop and an eight-hour day. Both the closed shop and the eight-hour day are unlawful when it is attempted to coerce the employer to enter into it against his will. The United States Supreme Court held that the sovereign power of the state of New York could not force an eight-hour day upon the employer, and what the sovereign power of a state cannot do, cannot be done by any other power, and the union of labor, like all others, whether natural or artificial persons, must yield its principles whenever they conflict with the law of the land."

When judges can rise above the fear of political assassination and begin to see as clearly as does Judge Holden, in the opinion just quoted, that the old principles of the common law which were made, according to Blackstone, "to command what is right and prohibit what is wrong," are as applicable to methods employed by labor unions in enforcing their demands as to those employed by other organizations or individuals, there will be more justice effected in the settlement of labor disputes, especially in the interest of the innocent third party to such controversies, the non-union laborer, who is sought to be deprived of his God-given right to earn his living in any legitimate way he may choose.

NOTES OF IMPORTANT DECISIONS.

DAMAGES FOR DELAY IN WORK, LIMITED TO THOSE ACTUALLY SUSTAINED AND NOT AMOUNT OF PENALTY.—In the recent case, Stephens v. Phœnix Bridge Co., Circuit Court of Appeals, Second Circuit, 139 Fed. Rep. 248, the questions brought up for review, were upon a judgment upon a verdict:

The action was brought to recover the reasonable value of the materials and labor furnished by the plaintiff for a viaduct which the defendants were erecting for the city of New York upon a written contract between them and the city. It appeared upon the trial that the materials and work were furnished under a contract between the parties by which the plaintiff undertook to complete the metal work of the structure at a specified date, and "to be subject to a penalty of one hundred dollars per day for any time beyond that day," and by which the defendants undertook to pay as the work progressed, upon monthly estimates, reserving 15 per cent of the contract price, which was to be paid within 60 days after completion, part in cash and part in four months' notes of the defendants. Performance was not completed by the plaintiff within the time specified by the contract, but full performance otherwise was subsequently made, and the defendants accepted the work and paid all sums due by the terms of the contract, except the reserved payment, which amounted to $13,960, less $4,000 owing to the defendants for the use of their plant and other assistance. It was not disputed upon the trial that the reasonable value of the labor and materials was the contract price, but the defendants contended that, the contract not having been performed by the plaintiff within the specified time, the plaintiff was not entitled to recover, and that in any event the defendants were entitled to a deduction of $100 per day for the delay. The trial judge ruled against these contentions, and allowed the defendants to prove the amount of their actual damages caused by the delay.

The only assignments of error that require notice are those which challenge the rulings of the trial judge that the plaintiff was entitled to maintain the action notwithstanding it had not fulfilled the terms of its special contract with the defendants; that the defendants were entitled by way of counterclaim only to the actual damages sustained by the delay in the completion of the contract, and not to the $100 per day mentioned in the contract; and that the plaintiff was entitled to interest upon any amount which the jury might find to have been owing by the defendants to the plaintiff from the time when the demand became payable.

There was nothing apparent on the face of the contract, and nothing in the intrinsic facts bearing upon the subject-matter of the contract or the situation of the defendants in respect to the consequences of delay, to show that the damages likely to be sustained by the defendants by delay in fulfilling the contract were extraordinary, or in their nature uncertain or incapable of being definitely ascertained. The case was, therefore, one where the general rule applies that the use of the word "penalty" in such a contract is not to be regarded as intended to fix the measure of recovery for a breach, but the party claiming damages must prove his actual damages.

It was held in Senner v. Watkins (1840), "that penalties are given at law to those unable to establish the extent of the injury sustained. They

may, 'notwithstanding the penalty,' in an ordinary action, claim damages exactly commensurate with the injury." 16 La. Ann. 204. This rule is one that is found to work well both ways. It would be unconscionable to hold a party to a penalty of $100 per day for delay in completion of building when the damages were actually $10. On this question see Wilkinson v. Colley, 26 L. R. A. 114, 15 Cent. Dig., Damages, sec. 179.

Notwithstanding the greater liberality of the more recent adjudications in allowing interest by way of damages for withholding the payment of money justly owing against the delinquent party, none to which we have been cited go the length of allowing it in a case like the present. The sum owing from the defendants to the plaintiff was uncertain, and unascertainable by computation, at the time of the commencement of the action; it depended not only upon what should be found to be the reasonable value of the material and services furnished by the plaintiff, but also upon the amount which it should be found ought to be deducted from the plaintiff's claim, and this amount was likewise uncertain, and unascertainable by computation. That interest is not allowable from the commencement of the action upon such a state of facts is very satisfactorily shown by the opinion in White v. Miller, 78 N. Y. 393, 34 Am. Rep. 544. That it is not allowable at all was determined in Delafield v. Village of Westfield, 169 N. Y. 582, 62 N. E. Rep. 1095, which is a case exactly in point, and which was cited and unquestioned in the later case of Sweeney v. City of New York, 173 N. Y. 414, 66 N. E. Rep. 101, where the general question of allowance of interest upon unliquidated demands was carefully considered by the court. See, also, Carricarti v. Blanco, 121 N. Y. 230, 24 N. E. Rep. 284. In the absence of controlling decisions in the federal courts, we are disposed to adopt as guides, in determining when interest should or should not be allowed, the rules deducible from the decisions in New York, where the question in all its phases has been so frequently and so fully discussed. We are satisfied that interest should not have been allowed in the present case, and the amount allowed being $1,295.37, the recovery was to that extent excessive.

STATUTE OF FRAUDS—GIVING OF POSSESSION IS SUFFICIENT TO ENFORCE VERBAL CONTRACT FOR SALE OF REAL ESTATE.—In the case of Jomsland v. Wallace, 81 Pac. Rep. 1094, points like the above are important to keep in mind, though simple enough in themselves. At first blush it might seem that the giving of possession without the payment of the consideration would not be sufficient to take the transaction out of the statute of frauds. The grounds upon which the doctrine has been based are two: First, "that the possession would expose the vendee to liability as a trespasser, and for the rents and profits, unless he was permitted to show the authority under which he entered; and evidence having been admitted to prove the verbal contract for this purpose, there is nothing in the statute which prevents a court from giving it full force and effect in establishing the contract by such evidence; and secondly, in the language of an eminent equity judge, 'the acknowledged possession of a stranger on the land of another is not explicable, except upon the supposition of an agreement, and has, therefore, constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into its terms, the court regarding what has been done as a consequence of the contract.'" This rule is shown to be established in all but one or two of the states of the union, each of which has but recently had but a limited jurisdiction in equity. Pomeroy on Contracts, Specific Performance, Sec. 115. In the principal case the Washington Supreme Court said in part:

"Referring to the question of the statute of frauds, it is a well-established principle in equity that a verbal contract for the sale of real estate can be enforced if part performance thereof can be clearly shown Pomeroy's Specific Performance (2nd Ed.), § 96 *et seq.* There is no question but that this contract has been not only partly, but fully performed, except that appellant Andrew O. Jomsland has not executed and delivered a deed to the respondent. It is also a well-established principle in equity that possession of real estate resulting from an oral contract for the sale thereof, with the consent of the vendor, is an act of part performance which takes the contract out of the statute of frauds, even without the additional circumstances of the payment of consideration or the making of improvements. Pomeroy's Specific Performace (2nd Ed.), § 115 *et seq.*; Mudgett v. Clay, 5 Wash. 103, 31 Pac. Rep. 424; Menger v. Schulz, 28 Wash. 329, 68 Pac. Rep. 875; Johnson v. Pugent Mill Co., 28 Wash. 515, 68 Pac. Rep. 867. The evidence and findings here both show not only full payment and improvements, but also that, after the making of said oral agreement respondent entered into possession of said land in pursuance thereof, and with the consent of appellants."

STATUTES REGULATING MEDICAL PRACTICE.

Legislation dealing with the subject of medical practice dates back in England as far as 1511, when it was provided by statute 3 Henry VIII, ch. 11, that no person might exercise the calling of a physician and surgeon until he had been examined and approved. In this country statutory enactments obtain in the various states prescribing the qualifications of practitioners of medicine and surgery and otherwise regulating the practice of

these professions. Such legislation has been uniformly upheld as a valid exercise of the police power of the state.[1] It has given rise to an interesting series of judicial determinations, which it is proposed here to consider, as to what constitutes a practicing of medicine and as to the true scope of the prohibition of such practice without certain prescribed qualifications. The word "medicine" refers to the art of healing, the art and science of curing disease and all persons who diagnose diseases and prescribe or apply any therapeutic agent for their cure ordinarily fall within the designation of "practitioners of medicine."[2] In order to constitute a violation of the statutes, it is not necessary that the unqualified person should administer medical treatment in more than one instance,[3] or that he should be a practitioner of medicine in the ordinary and popular sense of the phrase.[4] In an early and leading case it was held, that one who practiced bone-setting and reducing of sprains, swellings and contractions of the sinews by friction or fomentation, but no other branch of the curing art, came within the designation of one who practices physic or surgery.[5] So, one who held himself out as a physician and advertised that he treated and cured persons afflicted with the "opium habit," was held subject to the penalty of a statute prohibiting the practice of medicine and surgery without a license.[6] The same ruling was made in the case of a defendant who treated "alcoholism," prescribing and furnishing the remedy, but employing licensed physicians to take immediate charge of the patients and administer the remedy.[7] In another case of a prosecution for practicing medicine without a license, the court found no difficulty in concluding that the practice of the one branch only of obstetrics came within the statute.[8] On the other hand, such legislation has been held not to apply to the case of persons who cure diseases by means of massage or like systems of drugless healing.[9] It has also been held that the mere recommending and selling of a patent remedy, or specific, does not constitute a practicing of medicine. Such was the case of a person who recommended and offered for sale an instrument called an "oxygenor," to be attached to the wrist or ankle for relieving rheumatism.[10]

Nearly all the various schools of medicine and methods of curing disease, "regular" and otherwise, are represented in the controversies to which medical legislation has given rise. In an action of assumpsit for services rendered to the defendant's intestate, it appeared that the plaintiff professed to be a clairvoyant. When asked to examine the patient, she "saw the disease and felt as the patient did." The court ruled, that as the plaintiff, though she did not call herself a physician, visited her sick patients, examined their condition, determined the nature of the disease and prescribed the remedies deemed by her most appropriate, she rendered medical services within the meaning of an act providing that no person not possessing certain qualifications should be entitled to recover any compensation for such services.[11] The same ruling was followed in the case of a charlatan who practiced what he styled "magnetic healing."[12] The matter of the practice of osteopathy has given rise to a diversity, if not a conflict, of rulings. The Illinois statute provides, that any person shall be regarded as practicing medicine within the meaning of the act, who treats, operates on, or prescribes for any physical ailment of another. Upon an indictment charging the practice of medicine without a license, it was contended by the defendant, an osteopathist, that because he used no medicines or instruments he was not amenable to the statute. This contention was overruled, the case being differentiated from that of Smith v. Lane.[13] While the defendant might rely wholly upon manipulation, flexing, rubbing, extension, etc., yet he professed to have skill and judgment in these methods, so as properly to adapt the treatment to each case, giving it what is ap-

[1] Reetz v. Michigan, 188 U. S. 505; Williams v. People, 127 Ill. 184; State v. Call, 121 N. Car. 643; Scholle v. State, 90 Md. 729; State Board v. Roy, 22 R. I. 539, 53 Cent. L. J. 3; Parks v. State, 159 Ind. 211; *Re* Inman, 8 Idaho, 398; *Ex parte* Grino, 143 Cal. 412; State v. Heath, 125 Iowa, 585.

[2] Bragg v. State, 134 Ala. 165.

[3] Antle v. State, 6 Tex. App. 202.

[4] Bragg v. State, *supra*.

[5] Hewitt v. Charier, 16 Pick. 353.

[6] Benham v. State, 116 Ind. 112.

[7] Springer v. District, 23 App. D. C. 59.

[8] State v. Welch, 129 N. Car. 579.

[9] Smith v. Lane, 24 Hun, 632; State v. Biggs, 133 N. Car. 729, 58 Cent. L. J. 386.

[10] People v. Lehr, 196 Ill. 361.

[11] Bibber v. Simpson, 59 Me. 181.

[12] Parks v. State, *supra*.

[13] *Supra*.

propriate in amount and with repetition at such times and to such extent as might be dictated by his knowledge and experience. This was held to bring him within the definition of the statute.[14] On the other hand, the practice of osteopathy was held not to fall within the definition of a former Ohio statute, which provided that any person should be regarded as practicing medicine, who, for a fee, prescribed, directed or recommended for the use of any person any drug or medicine or other agency for the treatment, cure or relief of any wound, fracture or bodily injury, infirmity or disease. It was ruled that "the system of rubbing and kneeding the body, known as osteopathy was not an "agency" within the meaning of this act, and the decision was put partly on the ground, that in obedience to the doctrine of *noscitur a sociis*, the meaning of the word "agency" had to be limited in construction by that of the associated words "drug and medicine."[15] This case was followed substantially by a case in Kentucky,[16] which arose under a somewhat similar statute. It was there said, that an osteopathist does not "practice medicine," but is rather on the plane of a trained nurse, and the case was likened to that of Smith v. Lane.[17] The Ohio and Kentucky cases were cited and followed in Mississippi.[18] Since the decision above cited, the Ohio statute was amended and a more comprehensive definition given of the practice of medicine, so as to apply to the case of any one who shall prescribe, or who shall recommend for a fee for like use, any drug or medicine, appliance, application, operation or treatment, of whatever nature, for the cure or relief of any wound, fracture, or bodily injury, infirmity or disease. It was thereupon held that the system of rubbing and kneeding the body, known as osteopathy, is comprehended within the practice of medicine as thus defined.[19] It is now generally held that the practice of osteopathy falls within the meaning of acts covering the practice of medicine in general terms.[20]

Another method of treatment that has come before the courts is that of Christian Science. This is a system of religion as well as of healing which bases its teaching on the Scriptures as understood by its adherents. It is almost universally held, that the giving of Christian Science treatment, at least, when for a fee or compensation, is a practicing of medicine within the meaning of statutes regulating such practice.[21] Provisions prohibiting the practice of medicine by other than qualified physicians and thus excluding Christian Scientists do not violate constitutional provisions guaranteeing the free exercise of religion.[22] The exercise of the art of healing for compensation, whether exacted as a fee or expected as a gratuity, cannot be classed as an act of worship; nor is it to be regarded as the performance of a religious duty.[23] In one instance, a somewhat different view was taken. In a prosecution under a statute which in general terms prohibited the practice of medicine in any of its branches by persons not possessing certain qualifications, the defendant was acquitted on the ground that "mere words of encouragement, prayer for divine assistance or the teaching of Christian Science as testified to" in the case, did not constitute the practice of medicine. The defendant has assumed the title of "Dr.," but it was also found on the facts that he made no diagnosis or examination of disease and did not administer or prescribe any "drug, medicine or remedy."[24]

Christian Science and similar methods of healing may be classed as mental, or psychic cures. The "treatment" consists principally in calling into operation the recuperative mental force of the patient himself, which works toward the cure.[25] The attitude of the law towards these systems was clearly defined by the Supreme Court of the United States in a recent case.[26] The matter arose upon a bill for an injunction to restrain a postmaster from carrying out a "fraud order" of the postmaster general withholding matter sent to the complainant through the mail in answer to advertisements. The question in controversy was raised by demurrer to the bill. It appeared from the pleadings

[14] Holt v. People, 71 Ill. App. 236.
[15] State v. Liffring, 61 Ohio St. 39.
[16] Nelson v. State Board, 108 Ky. 769.
[17] *Supra.*
[18] Hayden v. State, 81 Mich. 291.
[19] State v. Gravett, 65 Ohio St. 289.
[20] Bragg v. State, *supra;* Little v. State, 60 Neb. 749.
[21] State v. Marble, 72 Ohio St. 21. *Cf. Re* First Church, 205 Pa. St. 543.
[22] People v. Pierson, 176 N. Y. 201.
[23] State v. Buswell, 40 Neb. 158.
[24] State v. Mylod, 20 R. I. 632.
[25] New Thought, Vol. 14, p. 187.
[26] American School v. McAnnulty, 187 U. S. 94.

that the American School of Magnetic Healing was a corporation extensively engaged in healing disease and teaching the science of healing, and a great part of its business consisted in treatment by letter and advice to people throughout the United States and in foreign countries. The system was founded on the "mental science," or psychic, theory of disease, to-wit, that the mind is largely responsible for human ailments and is a chief factor in healing. The principal office was located in the city of Nevada, Missouri, and the letters addressed to the institution were alleged to average three thousand per day. The postmaster general, acting under certain provisions of the Revised Statutes and acts of Congress,[27] decided the business referred to to be a fraud and directed the withholding of the complainant's mail matter. The effect of the legislation referred to is to enable the postal authorities to withhold mail matter from persons who are conducting business upon such a basis as to obtain money and property through the mails by means of "false or fraudulent pretenses, representations or promises." On appeal from a judgment sustaining the demurrer, the supreme court held that the suit could properly be maintained, the action of the postmaster general being illegal. The ground taken was, that the statutes upon which he based his order were not intended to cover any case of what he might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis. "Because," said the court, "the complainants might or did claim to be able to effect cures by reason of working upon and affecting the mental powers of the individual and directing them towards the accomplishment of a cure of the disease under which he might be suffering, who can say that it is a fraud or a false pretense or promise within the meaning of these statutes? As the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the postmaster general within the statutes relative to fraud."

The subject of mental science again came before the federal courts in a most interesting case,[28] which arose upon a number of indictments (consolidated) against a noted mental science healer, charged with the offense[29] of using the mails in execution of a scheme to defraud. The accused treated patients at a distance, corresponding with them through the mails and advertising in journals and pamphlets. She claimed to possess the power to cure all, or nearly all, diseases; to alleviate or remove many unfavorable conditions; by means of "absent treatment" to cure persons without their even having knowledge of being treated. The defendant was convicted in the District Court for the Southern District of Florida, but, upon writ of error, judgment was reversed in the circuit court of appeals. The gist of the charge was, that the defendant advertised to practice healing and received pay to treat patients, when she did not intend to administer any treatment. The trial court, referring to the power claimed by the accused, instructed the jury that such power is not recognized as a natural law by the experience of mankind and that she was attempting to establish a new and unrecognized law of nature; and therefore, the burden rested upon her to satisfy the jury that she possessed such power and could do what she practiced and advertised to do. The ruling was held erroneous, firstly, upon the ground that it contravened the well-settled rule as to the burden of proof, which rests upon the prosecution and requires it to establish beyond a reasonable doubt every fact material to the guilt of the accused and which never shifts, even though the defense consists of affirmative matter. It was further held that the instruction was erroneous, because the ultimate question of fact in the case was as to the good faith of the defendant, involving her belief in her representations and promises. It was not a question as to whether or not the treatment is one that should be approved or disapproved by the court or jury. The appellate court put its ruling upon the distinct ground, that as to the right to use the postal establishment of the United States, no discrimination is made between those whose vocation is healing, whether they be allopathists, homeopathists, osteopaths or mental scientists. Every man and woman, it was observed, has

[27] U. S. Rev. St., §§ 3920, 4041, 28 St. 963, 964.

[28] Post v. United States, 135 Fed. Rep. 1.

[29] Under 25 Stat. 783, U. S. Comp. St. 1901, p. 3697.

the right to believe what he or she chooses to believe; and any one who holds any belief may engage in practice founded upon it, unless he thereby injures others in person, reputation or property, or disturbs the peace and welfare of the public.

In utter defiance of what are supposed to be immutable laws of our being, the new-school healer sometimes steps in and effects a cure that appears little less than marvelous. In ancient times such performances were dubbed "witchcraft" and "sorcery." At the present day we have the more elegant epithets "charlatanism" and "malpractice," and such dissenters from commonly accepted beliefs are still at times strenuously prosecuted. In dealing with such cases, it might be well to bear in mind the admonition of the learned judge who delivered the opinion in the case last cited, that "the experience of the judiciary, as shown by history, should teach tolerance and humility, when we recall that the bench once accounted for familiar physical and mental conditions by witchcraft and that too at the expense of the lives of innocent men and women."

LEWIS HOCHHEIMER.

Baltimore, Md.

CARRIERS—REGULATION OF FREIGHT RATES.

TIFT v. SOUTHERN RY. CO.

United States Circuit Court, W. D. Georgia, June 28, 1905.

The reasonableness of a rate of charge for transportation is eminently a question for judicial investigation. Justice Blatchford, in Chicago, M. & St. Paul R. R. v. Minnesota, 10 Sup. Ct. Rep. 702, 134 U. S. 418, 33 L. Ed. 970.

It is no longer open to question that the interstate commerce commission is an expert tribunal empowered by law to determine in the first instance the reasonable or unreasonable character of the rate charged for transportation in interstate commerce.

Where a vast increase of lumber traffic had resulted in large increase of net revenue to the carrier, the service was inexpensive, required neither rapidity of movement nor specially equipped cars, shippers were obliged to furnish and pay for equipment, railroads were neither to load nor unload, the commodity was neither fragile nor perishable, the risk of damage was inappreciable, the industry affords a tonnage second in magnitude to any other transported by the carrier, an arbitrary increase to points of principal destination of two cents a hundred pounds is unreasonable and unlawful. This is especially clear where the particular traffic is practically destroyed immediately after the advance is made.

In this case the conclusions of the court agree with the conclusions of the interstate commerce commission. The enforcement of the advance will be enjoined, and, general counsel for respondents having stipulated *in judicio* they would repay to the shippers the sum total of the increased exactions in case such increase should be held illegal, a reference will be had to ascertain the amount thus due the complainants respectively, and decree will be rendered therefor.

SPEER, District Judge: An adequate statement of the issues in this case is given in the report of the interstate commerce commission which appears in the record. The southeastern freight association is a combination of common carriers. In the preamble of its organic agreement it is stated that its purposes are set forth in the following articles. A critical scrutiny of the articles will disclose its machinery, but we fail to discover any express statement of its purpose. It is, however, plainly enough to fix and control the rates to be charged by each and all of its members for the railway transportation of freight. Most of the railways constituting its membership are actively engaged in interstate commerce, and all of them may be. The territory to which this association extends its dominating control comprehends the states of Virginia, North Carolina, South Carolina, Georgia, Florida, and those portions of Tennessee and Alabama east of a line extending from Chattanooga via Birmingham, Selma and Montgomery to Pensacola. In that territory, with all of its varied products, with an area and population vaster than many empires of which we have an account, as regards every interest dependent upon the transportation of commodities, the action of the association is more authoritative than the firman of the sultan or the ukase of the czar.

On the 17th of April, 1903, the original bill was filed. The complainants are H. H. Tift, W. S. West, J. Lee Ensign, J. S. Betts & Co., Garbutt Lumber Company, Alapaha Lumber Company, Southern Pine Company, and all other members of the Georgia Sawmill Association (a voluntary association, not a party). The averments, in brief, were that the defendant companies had published, and were to immediately put into effect, an increase of two cents a hundred pounds in the rate on lumber from Georgia points to points of delivery on the Ohio river and beyond; that the threatened advance was unjust and excessive, and would result in irreparable injury. An injunction was sought upon the ground that the contemplated action of defendants was in violation of the act of congress to regulate commerce. A temporary restraining order was issued, with the usual rule calling upon the respondents to show cause why the injunction sought by the bill should not be granted. A general demurrer denying the jurisdiction of the Circuit Court of the United States as such and as a court of equity was interposed. Respondents also filed a response to the rule. A hearing was had upon the demurrer, and also upon the evidence submitted by both parties. By interlo-

cutory decree entered on the 16th day of May, 1903, it was held that the court had jurisdiction to grant the relief sought, if finally satisfied of the righteousness of complainants' demand; that the demurrer be overruled; that the bill, with amendments, be retained in the files of the court; and that the temporary injunction be dissolved.

Upon the dissolution of the restraining order, to wit, on the 22nd of June, 1903, the respondents at once made the advance rates effective. On the day following the complainants presented to the interstate commerce commission their complaint and their prayer that the advance be declared to be excessive, unjust, and unreasonable. Subsequently complainants again sought from this court an injunction to restrain the enforcement of the rates pending the action of the commission. Upon this application a full rehearing of the controversy was had. This involved an exhaustive discussion of the jurisdictional questions and the facts as well. The conclusions of the court may be found in 123 Fed. Rep. 789–796. In that case the court did not deny the injunction prayed for. It merely withheld action to await the report of the commission. This has now been submitted. After hearing and considering the voluminous evidence submitted, that body, on February 7, 1905, made its report. The report sustains *in toto* the contetions of the complainants, and declares that the advance in rates complained of was unreasonable, unjust, and violative of the act to regulate commerce.

The effect of the commission's report was strongly controverted in the argument. Counsel for the complainants insisted that it must be accepted by the court as true, unless it was wholly without evidence to support it. On the other hand, it was insisted that it was only *prima facie* correct, and tipped the judicial scale only by a hair's breadth. Our view is that it would be not only violative of explicit law, the settled policy of government, and the most practical principles of reason and justice for the courts of the nation, save for controlling reasons of law or fact, to discredit or disparage the conclusions of the interstate commerce commission. The act to regulate commerce (paragraph 14), declares that the "findings of fact set forth in the report of the commission shall in all judicial proceedings be deemed *prima facie* evidence as to each and every fact found." In paragraph 16 this provision is distinctly reiterated. Nor are we in any doubt as to the import of the expression "*prima facie* evidence." In Kelly v. Jackson, 6 Pet. 631, 8 L. Ed. 523, Mr. Justice Story declares that "*prima facie* evidence of a fact is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose." The authority of this case has been uniformly recognized. Rose's Notes on U. S. Reports, vol. 3, p. 301. It follows that the report of the commission declaring these advanced rates to be excessive and violative of the act to regulate commerce has such evidential effect that, had complainants been content to introduce the report and to rest their case without further evidence, it would have entitled them to the decree unless the respondents by preponderent and controlling evidence should rebut and disprove its findings. Lilienthal's Tobacco v. United States, 97 U. S. 268, 24 L. Ed. 901. In other words, the act of congress creates a rule of presumption in favor of the commissioner's report, which on its introduction, changes the burden of proof, as in this case, from the complainants to the respondents.

A highly significant feature of this case is the fact that the rates complained of are the result of concert of action on the part of the members of the Southeastern Freight Association. The Interstate Commerce Commission concludes that it is its duty to consider this joint or concert of action of the defendants as bearing upon the reasonableness and validity of the advanced rate which results. It holds that the element of competition is eliminated. In the absence of legitimate competiion, destroyed, as we shall presently see, by methods obviously illegal, the commission presumes that the advance rates are higher than legitimate competition would produce. In other words, the marked increase of charges for transportation of that commodity which, save one other, affords the largest tonnage of freight to the respondent roads, did not originate from a normal or reasonable exigency of the respondents' business. On the contrary, it was an arbitrary exaction, imposed by a combination of railroad agents made in restraint of the natural movement of the product in the lumber trade. This combination or concert of action on the part of the respondent railroads is plainly violative of that provision of the interstate commerce law which forbids pooling. This was enacted, among other things, for the purpose of securing competition. Pooling may be as well effected by a concert in fixing in advance the rates which in the aggregate would accumulate the earnings of naturally competing lines, as by depositing all of such earnings to a common account and distributing them afterwards. That such an association and concert of action between agents of naturally competing lines is destructive of competition is equally unanswerable. To entertain any other view is to ignore reiterated decisions of the Supreme Court of the United States any many rulings of the circuit courts and of the state courts. Perhaps the leading cases on this subject are United States v. Freight Association, 166 U. S. 341, 17 Sup. Ct. Rep. 540, 41 L. Ed. 1007; Joint Traffic Association Case, 171 U. S. 505, 19 Sup. Ct. Rep. 25, 43 L. Ed. 259. In the first case the court had under consideration the legality of the Trans-Missouri Freight Association. The agreement of that body may differ in form, but its substantial purpose was the same as that of the Southeastern Freight Association. It avowedly was the "mutual protection to the railroads by establishing and maintaining

reasonable rates, rules, and regulations on all freight traffic, both through and local." After argument by many of the most eminent counsel in the country, and after exhaustive consideration, the court held that the anti-trust law prohibiting contracts, combinations, and conspiracies in restraint of trade or commerce among the several states or with foreign countries apply to and cover common carriers by railroad, and a contract between them in restraint of such trade or commerce is prohibited even though the contract is entered into between competing railroads only for the purpose of thereby effecting traffic rates for the transportation of persons and property. It was further held that, in order to maintain such a contention the complainant is not obliged to show that the agreement in question was entered into for the purpose of restraining trade or commerce if such restraint is the necessary effect, and concluded that the anti-trust act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce. The court then proceeds to declare that the agreement of the association does in fact constitute such a restraint in violation of the law. It is proper to state that four judges, three of whom are not now on the bench of that court, dissented from this conclusion; but the opinion of the majority is, of course, controlling. In the subsequent case of United States v. Joint Traffic Association, 171 U. S. 505, 19 Sup. Ct. Rep. 25, 43 L. Ed. 259, the court, after full consideration, reaffirmed its holding in the Trans-Missouri case. It further declares that congress, with regard to interstate commerce, and in the course of regulating it in the case of railway corporations, has power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition. The tremendous significance of these findings is shown by the multitude of cases in which the doctrines announced have been utilized and reaffirmed. See Rose's Notes on U. S. Reports, vol. 12, p. 958 *et seq.*; also supplement to same publication, vol. 3, p. 795. Perhaps the most noted case on this subject is that of the Northern Securities Company v. United States, 193 U. S. 197, 24 Sup. Ct. Rep. 436, 48 L. Ed. 679. There it was held that a contract by which a majority of stock of two companies who owned parallal interstate railroads is transferred to a corporation organized for the purpose of holding and voting the same and receiving dividends and dividing the same pro rata among the stockholders of the two companies, violates the anti-trust law. Such is the superabundance of authority upon this subject that further citation will be superfluous. It may be pardonable to recall that one of the pioneer cases on this important topic was that of Rowena Clarke v. Central R. R. & Banking Company of Georgia (C. C.), 50 Fed. Rep. 338, 15 L. R. A. 683 *et seq.*, beard in this district. This case was decided in 1892. Commenting upon similar conditions, it was there observed:

"It is not difficult to perceive that a combination of corporations which produces a condition so inequitable cannot be sanctioned by the law. We believe that transactions of this character are within the spirit, if not within the letter of the act of congress known as the 'Sherman Anti-Trust Law' (Act July 2, 1890, ch. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). It is certainly, as we have seen, obnoxious to the law of Georgia, and it was certainly as obnoxious to the common law."

This decision was made 13 years ago. The principles then announced, which were challenged in many influential quarters, are now imbedded in the country's jurisprudence and in the legislation of the national congress. It was insisted with great earnestness by the learned special counsel for the respondents that because the various members of the association expressly stipulated in the articles of organization that each and all members could at will and at any time withdraw from the agreement to fix rates, it was not a combination in restraint of trade. This view seems wholly untenable. It is merely a recitation of a privilege which any party to an unlawful enterprise inherently enjoys. Confederates or conspirators who unite to do an unlawful act or to do a lawful act in an unlawful way may jointly or severally abandon the project. The law affords them the *locus pœnitentiæ*. If, however, the object of the conspiracy is accomplished, its character is not to be determined in view of the consideration that the conspirators might have repented, but with an eye single to the fact that they did not repent. Besides, it is indisputable that the agreements of the association were made to be kept, and not to be broken. Good faith between the members, not to mention a powerful compulsory force behind them, obliged that the agreements be kept, and the fact is, as the commission finds, they were kept.

The cardinal error to which the railroads have been committed in this important controversy is the apparent belief that they have the right, by arbitrarily increasing freight rates, to divert at any time to their own treasures a share of the profits of successful industries or occupations. It was not contended that the antecedent rates were unremunerative. As before stated, they were conceded to be profitable. That additional revenue was needed to meet increased expenses was the motive of the advance was testified by Vice President Culp of the Southern Railway Company. To quote his language: They "looked about to see where" they could best, but without injury, get that additional revenue, and one of the commodities which they thought would "bear an advance" was lumber. But the courts have more than once decisively corrected this assumption on the part of railway officials. It is true that the business of railway transportation is usually carried on by private capital invested

in corporations. It is, however, business of a *quasi* public nature. As we have seen, there is no doubt that within the limitations of the constitution it is subject to governmental control. These facts prohibit the agents of the railway from charging, like the owners of other property, any price they may choose to exact for the use of the railroad. The law does not fail to regard the enormous franchises which have been granted to the railroads by the public, their corporate powers, the right to avail themselves of the right of eminent domain, the right to protection against exorbitant restrictions or exactions from local authority, and other similar considerations. These views are very plainly set forth in the opinion of Justice Brewer sitting with the circuit court of appeals of the eighth circuit in the case of Chicago & N. W. R. R. Co. v. Osborne, 52 Fed. Rep. 914, 3 C. C. App. 347. The conclusion of the learned justice is that reasonable compensation for the service actually rendered is all that the railroad is permitted to exact. Five years after the decision just cited was made the Supreme Court of the United States had before it the same question. This was in the case of Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. Rep. 418, 42 L. Ed. 819. This was a case of great importance. The opinion was happily unanimous. It was argued for the appellant by Mr. John L. Webster and by Mr. Churchill, attorney general of the state of Nebraska, and with them appears the famous name of William J. Bryan. For the appellees there appeared J. M. Woolworth and that renowned leader of the American bar, the late Mr. James C. Carter. The case would be additional authority for the jurisdiction of this court in equity to prevent a multiplicity of suits, if such additional authority was needed; but the great duty which fell upon the court was to determine the rule for fixing the reasonableness or unreasonableness of transportation rates. The state of Nebraska had attempted to determine this by fixing an arbitrary maximum for the transportation of interstate commerce. This the court held it could not do. But in holding this it announced certain principles which the controlling officers of railroads, charged as they are with such vital duties to the commerce and welfare of the country, might well take to heart. "The railroad," said the court, "is a public highway, none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the state. Such corporation was created for public purposes. It performs a function of the state. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental control, though such control must be exercised with due regard to the guaranties for the protection of its property." It may not "fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public, or the fair value of the service rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders."

It is true, as insisted, that the operating expenses of the railroads have grown larger, and the percentage of operating expenses to gross earnings has increased. But it is also true that both gross and net earnings have steadily increased. The statement made in argument that the gross earnings of the Southern Railway have increased from $25,353,686 in 1899 to $42,313,248 in 1903 does not seem to have been challenged. In the same year the net earnings, it seems, had increased from more than eight millions to more than twelve and a half millions, and the net earnings per mile have increased more than one thousand dollars. While these figures are most encouraging, and will afford gratification to all of those who are broad-minded enough to rejoice in the prosperity of the railroads, which do so much for the welfare of the country and the advancement of its civilization, it is also true that this is probably an understatement of the real earnings of this great corporation. How needless, then, was the exaction upon the great lumber industry of the south, which has occasioned this costly litigation with all of its lamentable consequences. The hardship upon the complainants was incontestable. The findings of the commission show that under the old rates they had built up a prosperous trade in the Northwest. Under the new rates this practically ceased.

Railroads have no right to graduate their charges in proportion to the prosperity which comes to industries whose products they transport. With equal reason they might demand an increase of rates for the transportation of cotton with every increase in the value of our great staple. Indeed, to concede the principle for the fixation of rates upon which the railroads through the medium of the Southeastern Freight Association have acted in this case would concede their power to levy for no better service augmentation of tolls for every increase of profit in every line of endeavor won by the enterprise, sagacity, and industry of the American people. It is superfluous to add that a government of law, and not of men, will never tolerate such domination and control of the trade, manufactures, and commerce of the American people. These views relate exclusively to the facts before the court in this case as proven incontestably by the evidence and as found by the interstate commerce commission. Here is no attempt to discredit the incalculable services which are hourly rendered the country by the railways. In nothing do we share the animus or purposes of that sinister, selfish, and insincere agitation which would

excite, if it could, the masses of the people to hatred and injustice toward corporations. Such a propaganda provokes in the justly balanced mind, and particularly in the mind trained for the administration of law, and for the protection of property and personal rights, disapprobation, and, indeed, abhorrence. With sincere enthusiasm the judge of this court has elsewhere testified to the wonderful material blessings bestowed upon our once prostrate Southland by our great railway systems in "economies of operation, in constant, if gradual, reduction of rates, in increased facilities and more expensive accommodations, in more uniform service for longer distances without change of cars, in abolition of short disjointed lines under different management, in augmentation of shipping facilities, in physical perfection, of the properties and consequent safety to the public, in the steady increase in value of all the securities of these great highways of southern commerce. * * * And with what result? Where formerly asthmatic engines attached to unsafe and noisome trains through the solitudes of an impoverished country like a wounded snake dragged their slow length along, now we behold on massive rails of gleaming steel, on roadbeds of granitic ballast, successive sections of long freight trains sturdily steaming through a prosperous land, smiling with luxuriant crops, beautiful with neat and happy homes, the chimneys of great factories giving employment to thousands, almost marking the miles; or the admiration kindles and the pulse leaps as the limited express laden with its human freight glances by on its mission of progress and civilization." In nothing do we abate that enthusiastic approval of the services of the railways to the people; but not more than any other human agency is railroad management infallible. The patriotic and proper solution of every controversy involving the vast questions of transportation is simply the trial of each case on its particular facts, and with an eye single to the merits of the one party or the other. In interstate commerce this is exclusively a duty of the national tribunals, and the laws regulating such commerce are within the exclusive power of congress.

Innumerable are the cases in which the railroads themselves successfully invoke the identical principles here announced for their own protection against intemperate and injurious local legislation restrictive of their just powers and destructive of the just rights of their stockholders. Such was the case of Smyth v. Ames, *supra*. Such was the case of Chicago, etc., Ry. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. Rep. 462, 33 L. Ed. 970. See, also, Central R. R. v. Macon (C. C.), 110 Fed. Rep. 871; Iron Mountain R. R. v. Memphis, 96 Fed. Rep. 122, 37 C. C. App. 410; Milwaukee, etc., Co. v. Milwaukee (C. C.). 87 Fed. Rep. 577; Ball v. Rutland (C. C.), 93 Fed. Rep. 516; Cleveland City Ry. v. Cleveland (C. C.), 94 Fed. Rep. 409; Chicago, M. & St. P. Ry. v. Tompkins, 176 U. S. 173, 20 Sup. Ct. Rep. 336, 44 L. Ed. 417; Louisville, etc., v. McChord (C. C.), 103 Fed. Rep. 220. In all of these cases and many others of pertinent character which might be cited, corporations found themselves obliged to resort to the courts to obtain protection against rates which were unreasonably low. The courts of the country will be found prompt to protect them in the righteous exercise of righteous powers. They will be equally prompt in proper cases to protect the public or any individual from unrighteous exactions, particularly when invoked through the agency of unlawful combinations or associations in restraint of trade and commerce, affecting not only the welfare and happiness of the individual, but the thrift and prosperity of entire communities and great commonwealths.

In this case the conclusions of the court as to the issues involved agree with the conclusions of the interstate commerce commission as expressed by their report. A decree enjoining all the respondents against further enforcement of the rates complained of will be at once entered. Order will be taken referring to the standing master the pleadings and evidence, with instruction to ascertain the sum total of the increased rate paid by each of the complainants to either or all of the defendant companies since the rate went into effect and to the end of this litigation, and report such amount to the court, in order that, pursuant to the stipulation made by the respondents in open court, in case the complainants prevail, decree of restitution shall be made. Because of the vast extent of the lumbermen's business, and the great expense and inconvenience which might result to them, to the lumber trade, and the railways from the instantaneous enforcement of this injunction, when respondents may have purpose to appeal from this action, it will be ordered further that the decree now granted shall not take effect until 10 days from this date have elapsed, in order that the respondents or either of them, if they so desire, may seek the usual supersedeas.

NOTE.—*Judicial Determination of the Reasonableness of Freight Rates.*—The right of a court to regulate by decision in special cases rates charged by railroads for the carriage of goods is too well settled by authority to be controverted. The decision in the principal case so very ably sustains this ancient right of the judiciary that no further citation of authority is necessary.

The principal case is also interesting as seriously questioning the rule by which all freight charges are regulated by railroad traffic managers, viz., "charging what the traffic will bear." The court holds that having lowered a rate, a railroad cannot raise it again when the traffic becomes so profitable as to stand an increase. Railroad traffic managers say that this decision will seriously affect reduction of rates, for this reason; that if a railroad cannot raise a rate after it has once reduced it, a railroad will be careful never to lower a rate from the existing schedules even to encourage some struggling industry. They point out that often in times of panic or famine, or business depression, or in cases of struggling infancy of some line of business, it becomes necessary

to greatly lower the rates of transportation to save the business from perishing. When prosperity comes to such business, the railroads claim that, having lowered their rates to save the business from destruction, they have a right to raise them again, in order to balance their loss and to be able to be of equal service to other struggling business adventures. It cannot be denied that within the limits of this argument is apparent a principle which courts must always bear in mind in denying the contention of a railroad in any particular case that it has a right to raise the schedule of rates for transportation of any particular traffic. On this point the words of Mr. W. M. Ackworth, in his work entitled, "The Elements of Railway Economics" are apropos: "The phrase 'charging what the traffic will bear' has, for some not very obvious reason, undoubtedly acquired an ill repute. On the face of it, it surely seems to represent a principle not of extortion, but of moderation. To charge what the traffic can bear is, in other words, not to charge what the traffic cannot bear. * * * The real meaning of the phrase is that, within the limits already described—the superior limit of what any particular traffic can afford to pay and the inferior limit of what the railway can afford to carry it for—railway charges for different categories of traffic are fixed, not according to an estimated cost of service, but roughly on the principle of equality of sacrifice by the payer. So regarded, 'what the traffic will bear' is a principle, not of extortion, but of equitable concession to the weaker members of the community. Had railway managers in the past declared that their principle was 'tempering the wind to the shorn lamb,' their descriptive accuracy would have been equally great, while their popularity might have been even greater. * * * Translated into railway language, the principle means this: the total railway revenue is made up of rates which, in the case of traffic unable to bear a high rate, are so low as to cover hardly more than actual out-of-pocket expenses; which, in the case of medium class traffic, cover both out-of-pocket expenses and a proportionate part of the unapportioned cost; and which finally, in the case of high-class traffic, after covering that traffic's own out-of-pocket expenses, leaves a large and disproportionate surplus available as a contribution towards the unapportioned expenses of the low-class traffic, which such traffic itself could not afford to bear. This, in principle and in outline, is the system of charging what the traffic can bear. It is the system which—the point must be reiterated—is, always has been, and, as far as we can see, always must be adopted on all railways, whether they be state enterprises or private undertakings. It is a system * * * in the interest of the public, because traffic is thereby made possible which could not come into existence at all if each item of traffic was required to bear not only its own direct expenses but its full share of all the standing charges."

Another point of great interest in the decision of the court in the principal case is the conclusiveness which it attaches to all findings of fact by the Interstate Commerce Commission holding that such findings constitute *prima facie* evidence in any case in which they may be controverted and even in the absence of any other evidence to support them, throws the burden of proving their falsity on any one who questions them. This is not only good law but good policy as well as it attaches to the decisions of the Interstate Commerce Commission a conclusiveness which will hereafter compel the respect of railroad traffic managers, who as a general rule have had nothing but words of contempt for the work of the commission. A few more ringing decisions of this kind by the federal courts may make unnecessary any further agitation for giving to the Interstate Commerce Commission extensive and plenary powers to fix and determine the maximum and minimum rates of transportation on all classes of merchandise, a power which many conservative people think is too great to grant to any political body such as the commission, as at present constituted, is sure to be.

JETSAM AND FLOTSAM.

THE RELEASE OF ONE JOINT TORT FEASOR AS A DISCHARGE TO THE OTHERS.

Under what circumstances the release of one joint tort feasor will operate as a discharge to the others is a question concerning which the courts of this country are not wholly in accord. Upon three points there is general agreement: 1. Where the injured party accepts from one tort feasor a sum in satisfaction of his cause of action, this fact, whether recited in the release or not, is a complete discharge of those others who are or might be made parties defendant to the suit for damages. Brown v. Cambridge, 3 Allen, 474; Delong v. Curtis, 35 Hun, 94. 2. In those jurisdictions where sealed instruments possess their common law character, a release under seal made to one joint tort feasor releases all. The reason for the rule, as stated in Ellis v. Esson, 50 Wis. 138, is that "the meaning of such a release cannot be controlled by parol evidence, and the law raises a conclusive presumption that it was given in full satisfaction for the injury and for a sufficient consideration. Urton v. Price, 57 Cal. 270; Rogers v. Cox, 66 N. J. L. 432. 3. A covenant not to sue one of the joint tort feasors will not release the others. Bailey v. Berry, 3 Ohio Dec. 483; Snow v. Chandler, 10 N. H. 92; Chicago v. Babcock, 143 Ill. 358.

The real question upon which the courts are not agreed is whether a release of one joint tort feasor independent of the question of full satisfaction, releases the others. A leading case supporting the affirmative of this question is Abb v. Railway Co., 28 Wash. 428. In that case a person injured by a collision between a passenger train and a street car accepted $300 and a pass from the street car company and executed a release, both parties to the transaction regarding this as a partial satisfaction only, but the court held that this release was a bar to an action against the steam railway company. In an early Virginia case, Ruble v. Turner, 2 Hen. & Mun. 38, the court thus enunciated the rule: "The law says that if one joint tort feasor be released it shall bar a recovery against all the rest. The plaintiff can no more change the law, in this particular, by any subsequent proviso or condition than he could change the course of descents as prescribed by law." Seither v. Phila. Traction Co., 125 Pa. 397, is perhaps authority for the above rule. The case of Turner v. Hitchcock, 20 Iowa, 310, may be noted as illustrating to what extreme it has been carried. In that case a number of women had made a raid upon the plaintiff's saloon and damaged his property. Subsequent to this and prior to beginning a suit for damages, plaintiff married one of the women. The court held that here was discharge by operation of law, that the intermarriage between the plaintiff and one of the tort feasors being a release to the one was a release to all. There was a dissenting opinion, concurred in by another judge.

In the recent case of Robertson v. Trammell (Tex.), 83 S. W. Rep. 258, where the facts were similar to those in Abb v. Railway Co., *supra*, it was held that "where an injured person accepted money from one of several joint tort feasors and dismissed as to him, and executed a release to him only, which did not show a release of the cause of action itself or full satisfaction of the claim for damages, such release did not discharge the other joint tort feasors. So in Mail Co. v. Barnes, 79 S. W. Rep. 261, decided by the Court of Appeals of Kentucky, it was said: "It is not the intention of the law to force people into litigation and prevent settlements out of court. . . . If ten persons committed a joint tort and injured a person to the extent of $1,000 and nine of them recognized the fact, and were willing to pay $100 each for the purpose of remunerating the injured person, and the tenth man refused to pay his $100, according to the appellant the injured party could not accept the $900 in part satisfaction and sue the stubborn tenth man. He would plead the settlement as a satisfaction and a bar. Such a construction of the law would be unreasonable and unjust." So in Bloss v. Plymale, 3 W. Va. 409, the rule laid down in Ruble v. Turner, *supra*, was denied and the court held that if damages are satisfied in part by payment or compromise with some of the defendants, plaintiff may still proceed against the others. Supporting this doctrine are the cases of Sloan v. Herrick, 49 Vt. 328, and Lovejoy v. Murray, 3 Wall. 1. There is a tendency in some of the courts to allow the intention of the parties to govern the extent to which a release may be given effect. Sloan v. Herrick, *supra;* Ellis v. Esson, 50 Wis. 138; Irvine v. Milbank, 15 Abb. Pr. N. S. 378.—*Yale Law Journal.*

HUMOR OF THE LAW.

A tarheel lawyer was trying a case before a jury, being counsel for the prisoner, a man charged with making mountain dew. The judge was very hard on him, and the jury brought in a verdict of guilty. The lawyer moved for a new trial. The judge denied his motion, and remarked:

"The court and the jury think the prisoner a knave and a fool." After a moment's silence the lawyer answered:

"The prisoner wished me to say he is perfectly satisfied—he has been tried by a court and a jury of his peers."

"If we ratify that canal treaty, what are you going to do for something to talk about?" asked Senator Spooner of Senator Gorman.

"Oh," said Gorman, "Providence will provide."

"That," said Spooner, "reminds me of the man out in Wisconsin who went to a revival, and was pressed to repent. He wavered for a time, and finally arose and said:

"'Friends, I want to repent, and tell how bad I have been, but I dassn't do it when the grand jury is in session.'

"'The Lord will forgive!' the revivalist shouted.

"'Probably he will,' answered the sinner, 'but he ain't on that grand jury.'"

"If yoh husband beats you, mebbe you kin hab him sent to de whippin' pos'," said Mrs. Potomac Jackson.

"If my husban' ever beats me," said Mrs. Tolliver-Grapevine, "dey kin send him to de whippin'-pos' if dey wants to. But dey'll have to wait till he gits out'n de hospital."—*Washington Star.*

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL—Death of Officer Sued for Official Misconduct.—A suit by a minority stockholder against an officer of a corporation for misappropriation of its funds does not abate on the officer's death.—Von Arnim v. American Tube Works, Mass., 74 N. E. Rep. 680.

2. ABATEMENT AND REVIVAL — Marriage of Female Pending Action for Assault.—The marriage of a female plaintiff pending an action for an assault is not cause for abatement.—Stevens v. Friedman, W. Va., 38 So. Rep. 132.

3. ACCORD AND SATISFACTION—Acceptance of Conditional Tender.—The acceptance by an employee of a check sent him in payment of wages at a certain rate, with directions to return it if the statement inclosed was not found correct, held an accord and satisfaction of the claim.—United States Bobbin & Shuttle Co. v. Thissell, U. S. C. C. of App., First Circuit, 137 Fed. Rep. 1.

4. ACCORD AND SATISFACTION—Good Faith. — Certain facts held to show a *bona fide* dispute, so that acceptance of a sum tendered in full of account operated as an accord and satisfaction.—D. N. Lightfoot & Son v. Edward Hurd & Co., Mo., 88 S. W. Rep. 128.

5. ACTION—Misjoinder of Causes. —That there was a common grantor to deeds of different tracts of land does not render an action to set aside both deeds and recover the land a single cause of action.—Griffith v. Griffith, Kan., 81 Pac. Rep. 178.

6. ANIMALS—Agister's Lien.—An agister's lien, superior where acquired to a prior chattel mortgage, held not to lose its priority by the cattle being taken to a state where such rule of priority does not obtain.—Everett v. Barse Live Stock Commission Co., Mo., 88 S. W. Rep. 165.

7. ANIMALS—Two Mile Limit Law.—Rev. St. 1887, §§ 1210, 1211, relating to the herding of sheep, and known as the "two mile limit law," is constitutional. — Walker v. Bacon, Idaho, 81 Pac. Rep. 155.

8. APPEAL AND ERROR—Exclusion of Evidence. — The rule that an assignment of error on the court's refusal to allow a witness to answer cannot be considered where it does not appear what the witness would have stated does not apply where the trial court rules out an entire line of competent evidence, or where he holds that a witness is incompetent and refused to hear him at all. —Union Ry. Co. v. Hunton, Tenn., 88 S. W. Rep. 182.

9. APPEAL AND ERROR—Exemplary Damages.—Where exemplary damages may be awarded, a verdict will not be set aside on the ground that the damages are excessive, unless passion or corruption is shown.—Stevens v. Friedman, W. Va., 51 S. E. Rep. 132.

10. APPEAL AND ERROR—Failure to File Briefs.—Where no briefs were filed by either party to an appeal after submission, as required by the rules, the appeal would be dismissed.—Missouri, K. & T. Ry. Co. v. Kidd, Ind. T., 88 S. W. Rep. 308.

11. APPEAL AND ERROR—Findings of Fact.—In a law case the supreme courts are not authorized to find facts, or to draw deductions from them and treat as found that which might have been found.—Mitchell v. Jensen, Utah, 81 Pac. Rep. 165.

12. APPEAL AND ERROR—Instructions in Action on Altered Contract.—On an issue as to whether plaintiff had consented to an alteration in a contract between himself and defendants, error in receiving evidence without the issues held cured by an instruction. — Harrison v. Lakenan, Mo., 88 S. W. Rep. 53.

13. APPEAL AND ERROR—Presumption as to Regularity of Judgment. — Appellate presumption in support of judgment regular on its face applied, notwithstanding defects in summons.—Snider v. Badere, Wash., 81 Pac. Rep. 302.

14. ASSAULT—Punitive Damages.—In tort, where gross fraud, malice, oppression, or willful and reckless conduct or criminal indifference to civil obligations appear, the jury may assess punitive damages. — Stevens v. Friedman, W. Va., 51 S. E. Rep. 132.

15. ATTORNEY AND CLIENT—Disbarment Proceedings. —Under Code Civ. Proc. § 291, relating to proceedings for disbarment, it is not necessary that an accusation be presented by a committee of a bar association or verified by a member of the committee.—*In re* Collins, Cal., 81 Pac. Rep. 220.

16. BAILMENT—Lien for Repairs.—One repairing machinery under a contract requiring payment when the work is done has a lien entitling him to retain possession of the machinery until the repairs are paid for.—Dutton & McMillan v. Shaw, Miss., 38 So. Rep. 638.

17. BANKRUPTCY—Fraudulent Concealment of Property.—The officer of a bankrupt corporation, who is not a bankrupt, is not liable to punishment, under Bankr. Act, July 1, 1898, ch. 541, § 29b, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433], for having fraudulently concealed the property of the corporation.—Field v. United States, U. S. C. C. of App., Eighth Circuit, 137 Fed. Rep. 6.

18. BANKRUPTCY—Illegal Preferences.—That insolvent pays one creditor in full is not evidence of an attempt to hinder or defraud other creditors, within Bankr. Act, July 1, 1898, ch. 541, § 67, cl. "e."—Kingsbury v. First Nat. Bank, Kan., 81 Pac. Rep. 187.

19. BANKRUPTCY—Intervention.—Denial of a nonparticipating creditor's right to intervene in an involuntary bankruptcy proceeding after the petition had been dismissed held a proper exercise of discretion.—*In re* Tribelhorn, U. S. C. C. of App., Second Circuit, 137 Fed. Rep. 3.

20. BANKRUPTCY—Provable Claims.—A claim for damages against a lessee for abandoning the house so that it was wrongfully entered and destroyed was not a provable claim in bankruptcy proceedings.—Winfree v. Jones, Va., 51 S. E. Rep. 153.

21. BANKRUPTCY—Surety as a Creditor.—A surety is a creditor within the meaning of the provision of the bankruptcy act, condemning preferential transfers to creditors.—Horstman v. Little, Tex., 88 S. W. Rep. 286.

22. BANKRUPTCY—Trust Funds.—A bankrupt's principal held not entitled to a preference for trust funds wrongfully mingled by the bankrupt with its own funds, and not shown to have augmented the bankrupt's estate in the hands of its trustee.—John Deere Plow Co. v. McDavid, U. S. C. C. of App., Eighth Circuit, 137 Fed. Rep. 802.

23. BANKS AND BANKING — Stoppage of Payment of Check.—The fact that the drawer of a check sued the payee for its proceeds held not to constitute a ratification of the payment of the check by the bank after its revocation.—Pease and Dwyer Co. v. State Nat. Bank, Tenn., 88 S. W. Rep. 172.

24. BILLS AND NOTES—Alteration.—Where, after a note was indorsed and delivered by the indorser to the maker, the latter altered it and delivered it to the payee, who took it without notice of the alteration, the indorser was liable to the payee, under Rev. Laws, ch. 73, §§ 69, 141.—Thorpe v. White, Mass., 74 N. E. Rep. 592.

25. BILLS AND NOTES—Credit by Wire. — Where the Bank of C wired the L Bank that A had deposited with it for the credit of the L Bank, for the use of plaintiff, $1,000, and countermanded the order the following morning before credit had been given, held, that the L Bank was not liable to plaintiff for such deposit.—Brinton v. Lewiston Nat. Bank, Idaho, 81 Pac. Rep. 112.

26. BREACH OF MARRIAGE PROMISE — Condonation.—Letter written by a woman to a man held not to constitute a condonation by the writer of the man's breach of promise to marry.—Mickens v. Phillips, Va., 51 S. E. Rep. 854.

27. BROKER—Nondelivery of Stock.—A broker, failing to deliver stock purchased for a client, held liable for the money paid by client on account to apply on the purchase price.—Hoogewerff v. Flack, Md., 61 Atl. Rep. 184.

28. BROKERS—Time of Employment.—A broker, employed to procure a purchaser for a farm, has, in the absence of any provisions in the contract of employment, a reasonable time in which to procure a purchaser, unless his authority is in the meantime revoked. —Sallee v. McMurry, Mo., 88 S. W. Rep. 157.

29. CARRIERS—Care Required in Operating Passenger Elevator.—Persons operating elevators in stores are common carriers of passengers and bound to exercise the highest practicable care to prevent injuries to them.—Hensler v. Stix, Mo., 88 S. W. Rep. 108.

30. CARRIERS—Injury to Licensee on Track. — Where defendant railroad company had knowingly permitted the public to use its track within the limits of a city as a walkway for a number of years, a person so using the track was a licensee, and not a trespasser.—Gulf, C. & S. F. Ry. Co. v. Matthews, Tex., 88 S. W. Rep. 192.

31. CARRIERS—Measure of Damages for Loss of Goods. —The measure of damages for loss of goods by a carrier is the value of the goods at destination, with interest from the time when the goods should have been delivered, less the unpaid costs of transporation. — Chesapeake & O. Ry. Co. v. F. W. Stock & Sons, Va., 51 S. E. Rep. 161.

32. CARRIERS—Negligence of Conductor.—Where the act of a conductor of a car in carrying a passenger by his stopping place in the darkness, etc., was the direct cause of his injury, it would be presumed that the conductor's act was within the scope of his authority.—Indianapolis & E. Ry. Co. v. Barnes, Ind., 74 N. E. Rep. 583.

33. CARRIERS—Special Rate Tickets.—A passenger held not relieved from a condition in a special rate ticket because of her not reading it. — Boling v. St. Louis & S. F. R. Co., Mo., 88 S. W. Rep. 35.

34. CHARITIES—Unauthorized Transfer of Securities.—A treasurer of a charitable corporation not engaged in commercial business has no implied authority to transfer or sell securities standing in its name.—Jennie Clarkson Home for Children v. Missouri, K. & T. Ry. Co., N. Y., 74 N. E. Rep. 571.

35. CIVIL RIGHTS—Separation of Races in Street Cars. —Small signs, having painted thereon the words "white" and "colored," held not adjustable screens within the meaning of Laws 1904, p. 140, ch. 99, providing for the separation of the white and colored races on street cars. —Southern Light & Traction Co. v. Compton, Miss., 38 So. Rep. 629.

36. COMMERCE — Exclusion of Benefit Society from State.—A foreign corporation, controlling the subordinate councils of a beneficial association with a state, is not engaged in interstate commerce in such sense as to preclude the legislature from excluding it from the state.—National Council Junior Order United American Mechanics v. State Council Junior Order United American Mechanics, Va., 51 S. E. Rep. 166.

37. CONSPIRACY—Civil Action.—A conspiracy cannot be made the subject of a civil action, unless something is done which, without the conspiracy, would give a right of action.—Wills v. Central Ice & Cold Storage Co., Tex., 88 S. W. Rep. 265.

38. CONSTITUTIONAL LAW—Power of Mayor to Suspend Police Officer.—Under Const. art. 8, § 117, held, that the mayor of Newport News had no authority to suspend a police officer.—City of Newport News v. Woodward, Va., 51 S. E. Rep. 193.

39. CONSTITUTIONAL LAW—Validity of Statute Respecting Damages by Mobs.—Gen. St. 1901, § 2501, authorizing recovery of damages against cities for the acts of mobs, is not unconstitutional, as depriving any person of property without due process of law.—City of Iola v. Birnbaum, Kan., 81 Pac. Rep. 198.

40. CONSTITUTIONAL LAW—Vested Rights.—A law reducing the interest rate on a redemption from execution sale held not unconstitutional.—Welsh v. Cross, Cal., 81 Pac. Rep. 229.

41. CONTEMPT—Solicitation to Bribe Jury.—A person soliciting an attorney engaged in the trial of a case to bribe the jurors through him by gifts of money is guilty of criminal contempt of court.—Hurley v. Commonwealth, Mass., 74 N. E. Rep. 677.

42. CONTRACTS—Between Corporation and Controlling Directors.—Unfair contracts between corporations and their controlling directors are voidable at the option of the corporation, its creditors, or stockholders.—Burnes v. Burnes, U. S. C. C. of App., Eighth Circuit, 137 Fed. Rep. 781.

43. CONTRACTS—Burden of Proving.—On an issue of *non est factum* the burden of proof is on defendant to show by a preponderance of the evidence that he did not execute the contract sued on.—Standard Mfg. Co. v. Hudson, Mo., 88 S. W. Rep. 137.

44. CONTRACTS—Delay in Rescinding for Fraud.—Delay, silence, or retention of the fruits of a contract induced by fraud after discovery of the fraud ratifies the agreement.—Burnes v. Burnes, U. S. C. C. of App., Eighth Circuit, 137 Fed. Rep. 781.

45. CONTRACTS—Failure to Specify Time for Completion.—One undertaking to repair machinery without any contract as to when the repairs shall be completed is only required to complete them within a reasonable time.—Dutton & McMillan v. Shaw, Miss., 38 So. Rep. 688.

46. CORPORATIONS—Action Against Stockholders.—The entries in the account books or other records of a corporation are not admissible against a party to prove that he is a stockholder, without proof of authorization, assent, or other confirmatory conduct.—Girard Life Ins. Annuity & Trust Co. v. Loving, Kan., 81 Pac. Rep. 200.

47. CORPORATIONS—Estoppel to Deny Incorporation.—Persons whose claims arise out of transactions with a company as a corporation are estopped to assert the invalidity of a deed of trust given by it to others, on the ground that it was not properly organized as a corporation.—Hasbrouck v. Rich, Mo., 88 S. W. Rep. 131.

48. CORPORATIONS—Power to Purchase its Own Stock.—Corporations in the absence of statutory prohibition have an inherent right to buy, to retire, and to sell their own stock.—Burnes v. Burnes, U. S. C. C. of App., Eighth Circuit, 137 Fed. Rep. 781.

49. CORPORATIONS—Right of Stockholder to Ask for Receiver.—Stockholder held to have a right to maintain a suit for the appointment of a receiver without having made a demand for an action by the corporation at a meeting of the stockholders.—Virginia Passenger & Power Co. v. Fisher, Va., 51 S. E. Rep. 198.

50. CORPORATIONS—Suit by Minority Stockholder.—A suit by a minority stockholder for the misappropriation of corporate funds by the officers held maintainable against the surviving officers and the representative of a deceased officer.—Von Arnim v. American Tube Works, Mass., 74 N. E. Rep. 680.

51. CORPORATIONS—Ultra Vires.—A corporation cannot be heard to plead that accommodation notes given by it with the consent of all the stockholders were *ultra vires*.—Perkins v. Trinity Realty Co., N. J., 61 Atl. Rep. 167.

52. COUNTIES—Attorney's Fees —Where a contract for the employment of an attorney provides for the payment of the attorney out of a certain fund, a judgment in the attorney's favor on the contract should provide for its satisfaction out of that fund.—Morrow v. Pike County, Mo., 88 S. W. Rep. 99.

53. COUNTIES—Contract by County Officer.—Where a county officer, with power to purchase supplies for public use, contracts with himself or with a firm of which he is a member to supply them, the contract is void on grounds of public policy.—Lainhart v. Burr, Fla., 38 So. Rep. 711.

54. CREDITORS' SUIT—Necessity of Acquiring Lien.—A general creditor cannot file a bill in equity to enforce a claim against a going concern; unless he has obtained a lien on the property, or it is otherwise provided by statute.—Virginia Passenger & Power Co. v. Fisher, Va., 51 S. E. Rep. 198.

55. CRIMINAL EVIDENCE — Separation of Jury After Submission of Case.—The uncorroborated affidavit alone of a juror, who deliberately separates himself from his associates in disregard of admonitions of the court, should not be accepted as a satisfactory explanation.—State v. West, Idaho, 81 Pac. Rep. 107.

56. CRIMINAL TRIAL—Ex Parte Statements.—Refusal, on trial for murder, to direct the prosecution to produce alleged *ex parte* statements of witnesses taken by the coroner, held not error.—People v. Jackson, N. Y., 74 N. E. Rep. 565.

57. CRIMINAL TRIAL—Presumptions as to Application for Continuance.—In the absence of a showing to the contrary, it will be presumed, on a criminal appeal, that an application for a continuance, the overruling of which is complained of, was a second application.—Sliger v. State, Tex., 88 S. W. Rep. 243.

58. CRIMINAL TRIAL—Right of Accused to Face Witness.—The constitution guaranties to every accused person the right of meeting face to face the witnesses of a state, and to read to the jury over objection transcript of the testimony of a witness in a civil proceeding is error.—State v. Woods, Kan., 81 Pac. Rep. 184.

59. DAMAGES—Pain and Mental Anguish.—Pain of body and mental anguish resulting from personal injuries are elements that enter into the estimation of compensatory damages.—Waechter v. St. Louis & M. R. R. Co., Mo., 88 S. W. Rep. 147.

60. DAMAGES—Tort.—Where shocked corn is purchased for cattle, and is subsequently wrongfully destroyed by the vendor, he is liable for the property destroyed and the direct consequences of the wrongful act.—Enlow v. Hawkins, Kan., 81 Pac. Rep. 189.

61. EMINENT DOMAIN—Compensation.—That the balance of a city lot not taken for public use was ample security for an irredeemable ground rent to which the lot was subject held not to establish that the owners of the ground rent were not entitled to compensation for the land taken.—City of Baltimore v. Latrobe, Md., 61 Atl. Rep. 208.

62. EMINENT DOMAIN—Elevated Railroads.—Fright of horses caused by the operation of an elevated railroad held not an element of damage recoverable by an adjoining property owner.—Swain v. Boston Elevated Ry. Co., Mass., 74 N. E. Rep. 672.

63. EMINENT DOMAIN—Railroad Depot as a Benefit.—Where the establishment of a railroad depot and switches near defendant's land was not a special benefit to him, it should not be considered in determining his damages in

condemnation proceedings.—Kirby v. Panhandle & G. Ry. Co., Tex., 88 S. W. Rep. 281.

64. ESCROWS—Performance of Conditions.—Where a deed is duly executed and delivered in escrow, performance of conditions renders the deed of full force, and the grantee is entitled to the possession, notwithstanding the death of the grantor.—Guild v. Althouse, Kan., 81 Pac. Rep. 172.

65. EVIDENCE—Carbon Copies of Letters.—Carbon copy of a letter may be introduced in evidence without notice to produce the duplicate original.—Chesapeake & O. Ry. Co. v. F. W. Stock & Sons, Va., 51 S. E. Rep. 161.

66. EVIDENCE—Contract to Bequeath.—Verbal promise of vendor to bequeath vendee difference in their estimates of the value of the land held without consideration, so that no account would lie for breach thereof.—Gemmer v. Hunter, Ind., 74 N. E. Rep. 536.

67. EVIDENCE—Earnings of Railroad for Taxation Purposes.—Where, on an issue as to the earning capacity of a railroad for purposes of taxation, whether certain items of debits and credits should be included was disputed, such items should be properly classified and submitted to the court.—State v. Nevada Cent. R. Co., Nev., 81 Pac. Rep. 99.

68. EVIDENCE—Record of Deed.—Where defendant proves execution, delivery, and loss of a deed, record thereof may be introduced as a copy of the original, though it has been ruled out because of noncompliance with registry laws.—Lancaster v. Lee, S. Car., 51 S. E. Rep. 139.

69. EVIDENCE—Written Contracts.—Where parties executed a written contract, such contract would be conclusively presumed to contain all the terms and constitute a waiver of all the matters discussed not included therein.—Standard Mfg. Co. v. Hudson, Mo., 88 S. W. Rep. 187.

70. EXCEPTIONS, BILL OF—Time for Filing.—Where no bill of exceptions was filed during the term, or within an extension of time then granted, the exceptant could not incorporate the proceedings in a bill filed at a subsequent term.—City of St. Louis v. Lawton, Mo., 88 S. W. Rep. 80.

71. EXECUTORS AND ADMINISTRATORS—Misapplication of Assets.—The estate of a decedent is not liable to the widow for the misapplication by the administrator of the proceeds of an insurance policy paid to the administrator for the widow.—Nickals v. Stanley, Cal., 81 Pac. Rep. 117.

72. EXECUTORS AND ADMINISTRATORS—Nonresidence. —Nonresidence does not disqualify one as executor, if he comes into the state and submits himself to the jurisdiction of the court, and personally conducts the affairs of the estate.—Rice v. Tilton, Wyo., 80 Pac. Rep. 828.

73. EXECUTORS AND ADMINISTRATORS—Order and Judgment Distinguished.—An order of notice is not a judgment, so as to preclude a probate court from amending its records by inserting an order of notice of appointment of executors.—Smith v. Whaley, R. I., 61 Atl. Rep. 178.

74. EXEMPTIONS—Selection.—Under Code 1892, § 1971, where aggregate value of personal property levied on was less than the amount of exemption, a selection of the particular articles claimed as exempt held unnecessary.—Bank of Gulfport v. O'Neal, Miss., 38 So. Rep. 630.

75. FEDERAL COURTS—Citizenship of Nominal Payee as Affecting Action on Note.—The citizenship of the nominal payee of a note, made to him as trustee, and in fact owned by another, is immaterial to the jurisdiction of a federal court of an action thereon by the real owner under the statute of Utah.—Franklin v. Conrad-Stanford Co., U. S. C. C. of App., Eighth Circuit, 137 Fed. Rep. 737.

76. FIRES—Negligent Setting Out.—Under Pol. Code, § 3344 a party setting out fire under dangerous conditions held liable for damages resulting therefrom, though he endeavors to prevent its spreading.—Sampson v. Hughes, Cal., 81 Pac. Rep. 292.

77. FIRE INSURANCE—Valued Policy Law.—A builder's risk insurance policy for more than the builder's interest in the building is governed by the valued policy law.—American Cent. Ins. Co. v. Antram, Miss., 38 So. Rep. 626.

78. FRAUD—Knowledge.—In an action for deceit, either knowledge on the part of defendant of the falsity of the alleged representations, or what in law is equivalent thereto, must be averred and proved.—Kimber v. Young, U. S. C. C. of App., Eighth Circuit, 137 Fed. Rep. 744.

79. FRAUDS, STATUTE OF—Mining Lease Signed by an Agent.—A mining lease signed by an agent of the grantors so as to bind himself only held sufficient to satisfy the statute of frauds.—Brooks v. Cook, Ala., 38 So. Rep. 641.

80. FRAUDULENT CONVEYANCES—Bankruptcy.—In a suit by a bankrupt's trustee to set aside an alleged fraudulent transfer of the bankrupt's interest in a saloon business, an order granting a new trial and setting aside a finding that the transfer was *bona fide*, and not an attempt to prefer the transferee as a creditor, held not error.—Lamb v. Hall, Cal., 81 Pac. Rep. 286.

81. FRAUDULENT CONVEYANCES—Evidence of Fraud.—On an issue whether a transfer by an insolvent was fraudulent, evidence that shortly before the transfer the insolvent had transferred other property to another party for less than it was worth was admissible.—Horstman v. Little, Tex., 88 S. W. Rep. 286.

82. FRAUDULENT CONVEYANCES—Husband and Wife.—Where a conveyance from husband to wife was not fraudulent when made, his creditors were entitled to have interest and taxes paid by him charged against the property.—Farr v. Hauenstein, N. J., 61 Atl. Rep. 147.

83. GIFTS—Essential Elements.—An essential element applicable alike to a gift *inter vivos* or a donation *causa mortis* is the delivery of the thing given, or the subject of the donation to the donee or to his use.—Wittman v. Pickens, Colo., 81 Pac. Rep. 299.

84. GUARDIAN AND WARD—Final Settlement.—The final settlement of a guardian stands upon the same footing as a judgment, and is conclusive as to all proper subjects of account included and involved.—May v. May, Mo., 88 S. W. Rep. 75.

85. GUARDIAN AND WARD—Liability of Sureties on Death of Insolvent Guardian.—Where guardian dies insolvent in another state, held, equity will take jurisdiction, ascertain the amount due from the guardian, and compel the sureties to pay.—Parker v. Dominick, 94 N. Y. Supp. 249.

86 HOMICIDE—Absence of Blood Stains.—On trial for murder, the fact that deceased bled profusely, and that no blood stains were found on defendant's clothes, does not create a presumption that he did not commit the assault.—People v. Jackson, N. Y., 74 N. E. Rep. 565.

87. HOMICIDE—Evidence.—Evidence held to sustain finding of murder in the first degree.—Commonwealth v. Johnson, Pa., 61 Atl. Rep. 246.

88. HOMICIDE—Evidence.—In homicide, testimony that deceased was not armed at the time of the difficulty held, under the circumstances, competent.—Moore v. State, Miss., 86 So. Rep. 504.

89. HOMICIDE—Provoking Difficulty.—To render one guilty of provoking a difficulty, it must be shown that he did some act at the time calculated to have that effect.—Pedro v. State, Tex., 88 S. W. Rep. 238.

90. HOMICIDE—Provoking Quarrel.—The question whether conduct was reasonably calculated to provoke a difficulty held not material where it was intended to and did provoke the difficulty.—Marlow v. State, Fla., 38 So. Rep. 658.

91. HOSPITALS—Liabilty of Railroad for Negligence of its Physicians.—Railroad hospital association held a distinct corporation from the railroad, and the latter was not liable for the negligence of the former's physicians in treating a railroad employee.—Illinois Cent. R. Co. v. Buchanan, Ky., 88 S. W. Rep. 812.

92. JUDGMENT—Assignment.—The assignee of a judgment, though a *bona fide* purchaser, takes subject to the

defense of payment by the judgment debtor in favor of persons interested in the lands on which the judgment was a lien.—Boice v. Conover, N. J., 61 Atl Rep. 159.

93. JUDGMENT—Res Judicata.—Where an issue is settled against a party in litigation, it is *res judicata* in a subsequent suit involving the same issue between the parties and their privies in estate.—Delaney v. West, Tex., 88 S. W. Rep. 275.

94. JUDGMENT—Scire Facias to Revive a Default.—On *scire facias* to revive a judgment by default in ejectment, a plea by a tenant of a part of the tract, alleging his tenancy and a surrender of possession, held insufficient to prevent judgment against him.—King v. Davis, U. S. C. C., W. D. Va., 137 Fed. Rep. 198.

95. LANDLORD AND TENANT—Assignment of Lease.—A covenant not to sell or assign a lease is not broken by an assignment by a receiver appointed for the lessee after execution of the lease.—Fleming v. Fleming Hotel Co., N. J., 61 Atl. Rep. 157.

96. LANDLORD AND TENANT—Division of Crops.—The stipulation in an invalid lease held to furnish the basis for division of a crop raised by the lessee.—Snyder v. Harding, Wash., 80 Pac. Rep. 789.

97. LANDLORD AND TENANT—Effect of Local Option Law on Lease of Saloon.—Though a lease provided that the premises should be used for the saloon business, the contract was not rendered illegal, nor the lessee absolved, by the adoption of local option in the county.—Houston Ice & Brewing Co. v. Keenan, Tex., 88 S. W. Rep. 197.

98. LANDLORD AND TENANT—Eviction.—A tenant cannot claim an eviction because of untenantable condition of premises, where he remained in possession of the premises for some time.—Ernst v. Wheatley, 94 N. Y. Supp. 1116.

99 LIBEL AND SLANDER—Imputation of Dishonesty in Trade.—A false publication, impairing the credit of a merchant by imputing insolvency or trickery touching his trade or occupation, is libelous *per se*.—Ukman v. Daily Record Co., Mo., 88 S. W. Rep. 60.

100. LIBEL AND SLANDER—Privileged Communications.—Publication concerning public officer held to be in excess of privilege of fair comment and criticism as matter of law, so that it was not error to refuse to submit the question of its being privileged to the jury.—Byrne v. Funk, Wash., 80 Pac. Rep. 772.

101. LIENS—Equitable Mortgage.—A contract to execute a deed of trust on certain real estate to secure attorneys' fees, on the attorneys' success in vesting the title to the property in their client, held an equitable mortgage.—Patrick v. Morrow, Colo., 81 Pac. Rep. 242.

102. LIFE ESTATE—Adverse Possession.—Where deed reserves life estate to widow, with remainder in fee simple to grantee, adverse possession cannot run against grantee until widow's death.—Senterfelt v. Shealy, S. Car., 51 S. E. Rep 142.

103. LIMITATION OF ACTIONS—New Promise.—A writing secring to H, executor of J, "the payment of whatever amount said B may owe him as such executor on a settlement," held not sufficient to constitute a new promise removing the bar of limitations.—Holley's Exr. v. Curry, W. Va., 51 S. E. Rep. 135.

104. LIS PENDENS—Delay in Prosecuting Suit.—A failure to prosecute a claimed right by appeal in a suit for nearly three years was such delay that the benefit of the suit as notice of the right was lost.—Boice v. Conover, N. J., 61 Atl. Rep. 159.

105. LIS PENDENS—Vacation of Judgment.—A landlord, who was not a party to and had no notice of an ejectment suit against her tenant until after judgment by default, held entitled to convey the land, and her right to have the judgment opened and be permitted to defend, to a purchaser, innocent or otherwise.—King v. Davis, U. S. C. C., W. D. Va., 137 Fed. Rep. 222.

106. MARRIAGE—Cohabitation.—Formal consent to be man and wife under a void statutory marriage, not followed by cohabitation, held insufficient to establish a common-law marriage.—Hawkins v. Hawkins, Ala., 38 So. Rep. 640.

107. MASTER AND SERVANT—Contributory Negligence.—A servant is not precluded from recovery for injuries sustained by the negligence of the master, if the risk is not of such a character that a reasonably prudent person would not continue in the service.—Whaley v. Coleman, Mo., 88 S. W. Rep. 119.

108. MASTER AND SERVANT—Damages for Wrongful Discharge.—Where an employee is discharged unlawfully, the master is not liable for remote damages arising from unjust inferences drawn from the discharge.—Berlin v. P. L. Cusachs, La., 38 So. Rep. 589.

109. MASTER AND SERVANT—Exemplary Damages as to Malicious Acts of Servants.—Exemplary damages cannot be recovered for the malicious acts of railroad agents in failing or refusing to carry a passenger, where ratification is not shown.—Townsend v. Texas & N. O. Ry. Co., Tex., 88 S. W. Rep. 302.

110. MASTER AND SERVANT—Fellow Servants.—A fireman on a passenger engine held a fellow servant with the conductor of a passenger train approaching in an opposite direction, for whose negligence, resulting in the fireman's death, the railroad company was not liable.—Crosby v. Lehigh Valley R. Co., U. S. C. C. of App., Second Circuit, 137 Fed. Rep. 765.

111. MASTER AND SERVANT—Fellow Servants.—Where plaintiff was injured by the negligence of another employee in running an engine agains tthe one plaintiff was at work on, such employees were not fellow servants.—Mullin v. Northern Pac. Ry. Co., Wash., 80 Pac. Rep. 814.

112. MASTER AND SERVANT—Procuring Discharge of Nonunion Man.—A representative of a labor union cannot lawfully procure the discharge from employment of a nonunion employee on the sole ground that he is not a member of the union.—Berry v. Donovan, Mass., 74 N. E. Rep. 603.

113. MASTER AND SERVANT—Safe Place to Work.—A master held not bound to furnish a servant a safe place to work, where the danger is temporary or arises from the hazard and progress of the work itself.—Zeigenmeyer v. Charles Goetz Lime & Cement Co., Mo., 88 S. W. Rep 139.

114. MECHANICS' LIENS—Revival.—Subsequent delivery of materials under the same original contract will not revive a lien for a prior debt which has once been destroyed.—Westinghouse Air Brake Co. v. Kansas City Southern Ry. Co., U. S. C. C. of App., Eighth Circuit, 137 Fed. Rep. 26.

115. MINES AND MINERALS—Assumed Risk.—Acts and statements of a foreman in a mine on examining a drill hole held not to relieve plaintiff from the risk assumed by him of attempting to work on the hole without a further personal examination.—Poorman Silver Mines of Colorado v. Devling, Colo., 81 Pac. Rep. 252.

116. MINES AND MINERALS—Conflicting Locations.—The sufficiency of the location of a mining claim, with reference to natural objects or permanent monuments, is a mere question of fact.—Bonanza Consol. Min. Co. v. Golden Head Min. Co., Utah, 80 Pac. Rep. 736.

117. MINES AND MINERALS—Execution of Lease.—A mining lease, authorizing the grantors to extract and appropriate ores, is a grant of a part of the land, and must be executed in the same manner as a deed.—Brooks v. Cook, Ala., 38 So. Rep. 641.

118. MINES AND MINERALS—Specific Performance.—In a suit for specific performance of a contract to convey a certain interest in a mining claim in consideration of complainants' sinking three holes to bedrock, evidence held to sustain a finding of performance by complainants.—Meehan v. Nelson, U. S. C. C. of App., 137 Fed. Rep. 751.

119. MINES AND MINERALS—Failure to Pay Stock Assessment.—Plaintiff's failure to pay assessments levied to provide funds to continue operations of a mine, with knowledge that a failure to operate would forfeit the lease of the claim, held an abandonment of plaintiff's

rights in the property.—Hall v. Nash, Colo., 81 Pac. Rep. 249.

120. MUNICIPAL CORPORATONS—Fireman's Relief Fund.—City ordinance appropriating money received from state, under Act June 28, 1895, to firemen's relief association, held not to violate Const., art. 9, § 7, prohibiting appropriations to corporations, associations, or individuals.—Commonwealth v. Barker, Pa., 61 Atl. Rep. 253.

121. MUNICIPAL CORPORATIONS—Liability for Defective Sewers.—Whether the sewer was originally located and planned by the municipal officers under the general statutes, or by the city council under a special statute, the city is not liable.—Keeley v. City of Portland, Me., 61 Atl. Rep. 180.

122. MUNICIPAL CORPORATIONS—Right to Leave Team Standing in Street.—The right of a merchant to leave his team standing in the street while merchandise is being unloaded therefrom must be exercised with due regard to the rights of others lawfully using the street.—McCormack v. Boston Elevated Ry. Co., Mass., 74 N. E. Rep. 599.

123. NEGLIGENCE—Duty Toward Trespasser on Track.—Where plaintiff's child, in using the stone abutment of a railroad bridge as a passway, was a trespasser, the railroad company owed him no duty, except to avoid willfully injuring him.—Williamson v. Gulf, C. & S. F. Ry. Co., Tex., 88 S. W. Rep. 279.

124. NOVATION—Competency of Oral Testimony to Prove.—An offer to prove by oral testimony that a contract for a novation was "drawn" by which defendant was to be released from liability on a note was properly rejected where the contract was not produced nor its execution proved.—Franklin v. Conrad-Stanford Co., U. S. C. C. of App., Eighth Circuit, 137 Fed. Rep. 787.

125. PARENT AND CHILD—Custody of Children.—Mother of certain children living apart form her husband held entitled to retain their custody, subject to the father's right to visit and correspond with them.—*In re* Redmond, Mo., 88 S. W. Rep. 129.

126. PARTITION—Tenants in Common.—Judgment creditor of a co-tenant held entitled to sell the entire interest, notwithstanding voluntary partition subsequent to the judgment.—Boice v. Conover, N. J., 61 Atl. Rep. 159.

127. PARTNERSHIP—Bankruptcy.—Where a lessee of a hotel assigned a half interest in the buffet to another, and later sold the balance of his interest to a third person, the right to occupy the buffet during the continuance of the lease vested in the remaining partner.—Lamb v. Hall, Cal., 81 Pac. Rep. 288.

128. PARTNERSHIP—Charge for Services.—Partners are not entitled to charge each other or the firm for services in the firm business, unless there is a special agreement to that effect, or the agreement can be implied from the course of business.—Whitney v. Whitney, Ky., 88 S. W. Rep. 311.

129. PATENTS—Infringement.—The owner of a patent is not subject to a plea of estoppel, laches, or implied license because of delay in bringing suit against an infringer during the pendency of a test suit in which the validity of the patent was involved.—Hutter v. Koscherak, U. S. C. C., S. D. N. Y., 137 Fed. Rep. 92.

130. PAYMENT—Negligence in Presenting Check.—Drawer of check, who is notified of its loss and acquiesces therein, cannot plead, as a release of the debt for which the check was given, negligence of the creditor in failing to procure payment of the check.—Sharp v. E. Nathan Mercantile Co., Ark., 88 S. W. Rep. 305.

131. PERPETUITIES—Conveyance to After-born Children.—Trust to collect rents for certain person's support during life, and convey the property to his after-born children on his death, held, as to the conveyance, void.—Sacramento Bank v. Montgomery, Cal., 81 Pac. Rep. 188.

132. PERPETUITIES—Duration of Trust.—A trust created by will, to continue during the life of the testator's widow and 20 years after her death, is not repugnant to the rule against perpetuties.—Robinson v. Bonaparte, Md., 61 Atl. Rep. 212.

133. PLEADING—Admissions of Answer.—Where an answer is used in support of the bill, the whole thereof must be taken together and explanations given must be considered in connection with the admissions made.—Reager's Adm'r v. Chappelear, Va., 51 S. E. Rep. 170.

134. PLEADING—Admissions of Demurrer.—The words "fraudulent mismanagement," alleged in a bill to dissolve an insurance association, cannot be considered as an admission thereof by a demurrer to the bill.—Polk v. Mutual Reserve Fund Life Ass'n, U. S. C. C., S. D. N. Y., 137 Fed. Rep. 273.

135. PLEADING—Election Between Counts in Petition.—Plaintiff in an action against a street railroad for personal injuries held not obliged to elect between the counts of his petition.—Waechter v. St. Louis & M. R. R. Co., Mo., 88 S. W. Rep. 147.

136. PRINCIPAL AND AGENT—Deceit in Sale of Corporate Stock.—A contract for the sale of certain corporate stock held a mere contract of agency on the part of the sellers acting for defendants, who were, therefore, liable for the sellers' fraudulent representations made to induce purchases.—Briggs v. Foster, U. S. C. C. of App., Eighth Circuit, 137 Fed. Rep. 773.

137. PRINCIPAL AND SURETY—Character of Obligation.—Surety on bond for completion of buildings within certain time held liable for any loss sustained because of the buildings not being completed in the time limited.—American Bonding & Trust Co. v. Progressive Permanent Bldg., Loan & Savings Ass'n, Md., 61 Atl. Rep. 199.

138. PUBLIC LANDS—Leases.—An attempted lease of sixteenth section land by a county held not to have passed any title, and to have been beyond the power of curative statutes.—Sexton v. Board of Sup'rs of Coahoma County, Miss., 88 So. Rep. 686.

139. RAILROADS—Crossing Accident.—In an action for the death of plaintiff's son, killed in a crossing accident, held proper to admit evidence showing the absence of a flagman or gates.—Christensen v. Oregon Short Line R Co., Utah, 80 Pac. Rep. 746.

140. RAILROADS—Sparks From Engine.—A railroad company owes the duty of keeping its right of way clear of combustible materials liable to ignition by sparks from engines.—Atlantic Coast Line R. Co. v. Watkins, Va., 51 S. E. Rep. 172.

141. RECEIVERS—Debts Incurred by Receiver.—A decree directing payment of debts and expenses incurred by receiver should set forth specifically the amount of each claim and date from which interest is to be computed.—People's Nat. Bank v. Virginia Textile Co., Va., 51 S. E. Rep. 155.

142. RELEASE—Effect on Pending Litigation.—A general release, executed pending suit on an alleged liability of the grantor, held to discharge such liability.—Klopot v. Metropolitan Stock Exch., Mass., 74 N. E. Rep. 596.

143. REPLEVIN—Conditional Bill of Sale.—Contention that no such demand was made as to entitle seller in a conditional bill of sale to maintain replevin held not well taken.—Standard Furniture Co. v. Anderson, Wash., 80 Pac. Rep. 813.

144. ROBBERY—What Constitutes Dangerous Weapons.—Rubber hose, with a piece of lead in the end thereof, held a dangerous weapon, within Pen. Code, §§ 224, 228, defining robbery.—People v. Du Veau, 94 N. Y. Supp. 225.

145. SALES—Breach of Contract.—In an action to recover on a contract of sale of oil, where the defense was that the contract was terminated by the failure of plaintiff, evidence reviewed, and held insufficient to sustain the defense.—Crusel v. Hermitage Planting & Mfg. Co., La., 88 So. Rep. 648.

146. SEDUCTION—Letters Showing Previous Lascivious Condition of Mind.—In a prosecution for seduction, cer-

tain letters written to a third person by prosecutrix showing a vulgar and lascivious mind on her part, were admissible.—Nolen v. State, Tex., 88 S. W. Rep. 242.

147. SHIPPING—Private or Common Carrier.—In an action for loss of a cargo of brick while being towed by one of defendant's steamers under a private contract, whether defendant held itself out as a common carrier for the time being held for the jury.—Bassett & Stone v. Aberdeen Coal & Mining Co., Ky., 88 S. W. Rep. 318.

148. SPECIFIC PERFORMANCE—Estoppel.—Where a contract is made for a conveyance of land, and the title proves defective, an unconditional refusal by purchaser with knowledge to accept the title will preclude him from maintaining specific performance.—Riley v. Allen, Kan., 81 Pac. Rep. 186.

149. SPECIFIC PERFORMANCE—Title of Vendor.—A contract for the sale of land, made in good faith, may be specifically enforced by the vendor, notwithstanding the fact that he did not have the title at the time it was made, where such fact was stated and known to both parties, and he acquired the title before the time for performance arrived.—Day v. Mountin, U. S. C. C. of App., Eighth Circuit, 137 Fed. Rep. 756.

150. STREET RAILROADS—Duty to Look and Listen.—It is the duty of a person crossing railway tracks to look and listen until he is safely across, and it is not sufficient merely to look before going on the track.—Ross v. Metropolitan St. Ry. Co., Mo., 88 S. W. Rep. 144.

151. STREET RAILROADS—Injury to Bicycle Rider.—In an action for injuries to a bicycle rider in collision with a street car, evidence held to establish that the accident was the result, in part at least, of plaintiff's negligence, precluding a recovery.—Dechnene v. Greenfield & T. F. St. Ry. Co., Mass., 74 N. E. Rep. 600.

152. SUBROGATION—Payment of Taxes.—Where the purchaser at foreclosure redeems from tax sales, he is subrogated to the rights of the state as against a judgment creditor of the mortgagor redeeming from foreclosure.—Northern Inv. Co. v. Frey Real Estate & Investment Co., Colo., 81 Pac. Rep. 300.

153. TAXATION—Quieting Title from Tax Sale.—Where plaintiff asks to quiet title from a tax deed, and his complaint shows that defendants have paid the taxes, equity will not decree him a clear title until he has reimbursed the defendant.—Hole v. Van Duzer, Idaho, 81 Pac. Rep. 109.

154. TENANCY IN COMMON—Action for Rents Collected.—In an action at law by one co-tenant against another for rents collected and retained by the defendant for the use of building on their common property, the interests of the parties in the building itself cannot be adjudicated.—Ayotte v. Nadeau, Mont., 81 Pac. Rep. 145.

155. TRIAL—Instructing Verdict.—Though there be slight testimony, yet if its probative force be so weak that it only raises a mere surmise or suspicion of the existence of the facts sought to be established, the court should instruct a verdict.—Wills v. Central Ice & Cold Storage Co., Tex., 88 S. W. Rep. 265.

156. TRIAL—Instructions as to Impeached Evidence.—Where the testimony of a witness is wholly discredited, a charge that the jury may reject the testimony of any witness who they believe has willfully sworn falsely, etc., is proper.—Fields v. Missouri Pac. Ry. Co., Mo., 88 S. W. Rep. 134.

157. TRIAL—Judgment Against Married Women.—That defendant was a married woman when the action was instituted, and that her husband was not a party, is no ground for enjoining the execution of the judgment against her.—Church v. Gallic, Ark., 88 S. W. Rep. 307.

158. TRIAL—Misconduct of Counsel.—The trial judge, without objection from opposing counsel, should prevent counsel in his address to the jury from discussing extraneous issues, from introducing irrelevant facts, and from insinuating erroneous views of the law.—Union Pac. R. Co. v. Field, U. S. C. C. of App., Eighth Circuit, 137 Fed. Rep. 14.

159. TRIAL—Taking Photograph into Jury Room.—Permitting the jury in a personal injury case to take with them to the jury room a photograph of plaintiff after the injury was not reversible error, where the accuracy of the picture was not disputed.—Toledo Traction Co. v. Cameron, U. S. C. C. of App., Sixth Circuit, 137 Fed. Rep. 48.

160. TROVER AND CONVERSION—Sale of Securities.—A treasurer of a charitable corporation not engaged in commercial business has no implied authority to transfer or sell securities standing in its name.—Jennie Clarkson Home for Children v. Missouri, K. & T. Ry. Co., N. Y., 74 N. E. Rep. 571.

161. VENDOR AND PURCHASER—Specific Performance.—Where plaintiff sued to recover money paid on real estate contract, alleging that the title was defective, she could not obtain a decree for specific performance.—Duke v. Stuart, 94 N. Y. Supp. 235.

162. VENDOR AND PURCHASER—Time of Payment the Essence of the Contract.—Failure of a vendee to make payments as required under a contract making time of the essence held not to operate as a forfeiture of the contract, without affirmative action by the vendor.—Zeimantz v. Blake, Wash., 80 Pac. Rep. 822.

163. WATERS AND WATER COURSES—Deflection of Current.—Where a highway is injured by the deflection of the current of a stream by the erection of a dam as provided by law, the town cannot recover therefor.—Inhabitants of Durham v. Lisbon Falls Fibre Co., Me., 61 Atl. Rep. 177.

164. WATERS AND WATER COURSES—Enforcing Rule of Water Company.—A water company held not deprived of its right to enforce against a customer a rule, because it fails to enforce it against others.—State v. Everett Water Co., Wash., 80 Pac. Rep. 794.

165. WATERS AND WATER COURSES—Establishment of Dam.—Acknowledgment of report and their signatures in open court by commissioners appointed to investigate and report on application for establishment of mill and dam held sufficient compliance with the law.—Bishop v. Bagley, Va., 51 S. E. Rep. 205.

168. WATERS AND WATER COURSES—Irrigation.—Where the appropriator of water for irrigation uses the same without waste, no person can complain and no court can change his manner of use.—Nephi Irr. Co. v. Vickers, Utah, 81 Pac. Rep. 144.

167. WILLS—Contest and Right to Appeal.—Will contestants who are not heirs at law of a testator nor related to him are not parties aggrieved by the denial of their motion for a new trial, within Code Civ. Proc. § 988, providing that parties aggrieved may appeal.—*In re* Antoldi's Estate, Cal., 81 Pac. Rep. 278.

168. WILLS—Estate Devised.—Where realty is devised to testratrix's husband, with direction that after his debts and funeral expenses are all paid the remainder of the tract shall go to others, the devisee takes only a life estate in the land devised, with remainder over.—Carson v. Carson, Tenn., 88 S. W. Rep. 175.

169. WILLS—Execution.—To determine whether a will has been executed in proper manner, the intention of the testator is entitled to no consideration.—*In re* Seaman's Estate, Cal., 80 Pac. Rep. 700.

170. WILLS—Precatory Trust.—The test of a precatory trust is the clear intent of the testator to imperatively control the conduct of the party to whom the language of the will is addressed.—Burnes v. Burnes, U. S. C. C. of App., Eighth Circuit, 137 Fed. Rep. 781.

171. WITNESSES—Cross Examination.—Where counsel stated that he did not hope to obtain anything by certain cross-examination that he was about to enter upon, there was no error in refusing to permit him to go on with it.—Union Ry. Co. v. Hunton, Tenn., 88 S. W. Rep. 182.

172. WITNESSES—Right to Impeach One's Own Witness.—The state cannot impeach its own witness, unless the witness has testified to something injurious to the state.—Reyes v. State, Tex., 88 S. W. Rep. 245.